IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10862 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GAJAJI GOPALJI JADEJA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10862 of 2003

MR GIRISH PATEL, LD. SR. COUNSEL WITH
MR. SHALIN N MEHTA for Petitioner No. 1-299, 301-610
MR JS BRAHMBHATT for Petitioner No. 300
MR. KAMAL TRIVEDI, LD. ADDITIONAL ADVOCATE GENERAL WITH MS. SANGEETA VISHEN, AGP, for Respondent No. 1-2
MR JITENDRA MALKAN, CENTRAL GOVERNMENT STANDING COUNSEL for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 09/02/2005

C.A.V. JUDGEMENT

1. The petitioners - 610 in number, formally appointed by the Gujarat State under the Bombay Home Guards Act, 1947 and the Bombay Home Guards Rules, 1953, but really forming a special wing, known as Border Wing Home Guards (for short "BWHG") constituted under and governed by the Government of India's Scheme of 29.6.1979 for all border States for border duties, have filed this petition under Article 226 of the Constitution of India, praying before this Court that this Court may direct the respondent authorities namely State of Gujarat, through the Commandant General, Home Guards Headquarters, Ahmedabad respondent No.1, the Commandant No.2 Battalion, Border Wing Home Guards, Bhuj - Kachchh respondent No.2, Union of India - respondent No.3, to evolve fair, just and reasonable conditions of service for the petitioners herein and to further grant service benefits like fixation of pay, leave, over time, medical allowance, travelling allowance, retiral benefits like provident fund, pension, gratuity etc. to the petitioners along with arrears of the above-mentioned benefits since the time of their joining.

2. The petitioners further prayed that this Court may be pleased to declare the action of the respondents No.1 and 2 herein of terminating the services of 428 Border Wing Home Guards personnel out of the present group of 610, as illegal, bad and unconstitutional and to direct the respondents No.1 and 2 herein to reinstate all such petitioners in service with all consequential benefits from the date of their termination. The petitioners further prayed that this Court may issue a wit of mandamus or any other appropriate writ, order or direction to direct the respondent authorities to declare the petitioners as permanent and full-time members of the Border Wing Home Guards and to further treat them as such by paying all consequential benefits and other reliefs in this behalf.

3. It may be noted that, in this case, originally petition has been filed by the petitioners on 30th July, 2003, with voluminous record. The petitioners have filed affidavits on 30.10.2003, 28.10.2003, 25.11.2003, 2.1.2004, 19.7.2004 and 16.12.2004 from time to time. I have gathered facts from these affidavits of the petitioners.

4. As regards respondents, they have also filed affidavit in reply from time to time i.e. respondent Nos. 1 and 2 have filed affidavit in reply dated

29.9.2003, 7.10.2003, 4.11.2003, 3.12.2003, 13.7.2004, and 20.10.2004.

5. As regards respondent No. 3, an affidavit-in-reply has been filed by one Shri Pratap Singh, Assistant Director General, DGCD, New Delhi dated 6th December, 2004.

BACKGROUND OF THE MATTER:

6. It may be noted that, almost on identical grounds, some of the petitioners had originally filed a petition before this Court being Special Civil Application No.9113 of 2001 along with other petitions. However, during the pendency of the petition, the learned advocate for the petitioners stated that the petitioners would like to make representation to the State Government through Commandant of Home Guards for ventilating their grievances and he seeks permission to withdraw all these petitions. However, liberty was reserved to the petitioners, if ultimately the petitioners find that the decision of the State Government is not acceptable to the petitioners. In view of the same, this petition was disposed of by this Court by order dated 28.1.2003 (page No. 119).

6.1 It appears that thereafter the petitioners made a detailed representation dated 31.3.2003 to the respondent authorities. However, during the pendency of the representation, when the respondent authority did not decide the same, however it appears that the respondent authority has tried to terminate the services of some of the Border Wing Home Guards out of group of 610, the petitioners filed present petition somewhere in July 2003. During the pendency of the petition, it appears that the representation of the petitioners dated 31.3.2003 was rejected by the respondents by their communication dated 22nd September, 2003 (page 121).

6.2 It may be noted that, as indicated above, when the aforesaid petition was pending and the affidavits and all these facts have been shown and this Court (Coram: K.S.Jhaveri, J.) has passed the order dated 22.7.2004 (see: page 458) directing the State Government to constitute a High Level Committee consisting of top Secretaries and Officers both of the State Government and the Central Government and to consider the grievances of the petitioners regarding equal treatment with the regular employee and also similar service conditions. While passing this order, the learned Judge relied upon the decision of the Apex Court in the case of Gujarat

Agricultural University Vs. Labhu Bechar and others reported in 2001(3) SCC 574.

6.3 It appears that on 9.9.2004 the said Committee has also recorded/reviewed decision and rejected the contention of the petitioners without considering the basic facts of the case of the petitioner and without considering the judgement of the Hon'ble Supreme Court in the case of State of W.B. Vs. Pantha Chatterjee (2003) 6 SCC 469 and the judgement of the Hon'ble Supreme Court in the case of Gujarat Agricultural University Vs. Labhu Bechar and others (supra). The said decision of the Committee is also produced before this Court (page 462).

6.4 It may be noted that on behalf of the petitioners Shri Girish Patel, learned Senior Advocate with Shri Shalin Mehta have argued the matter at length. Thereafter Mr.Kamal B.Trivedi, learned Additional Advocate General and learned Sr. Advocate with Sangeeta Vishen, learned Advocate has also appeared on behalf of respondents No.1 and 2 and also argued elaborately and thereafter again learned Senior Counsel on behalf of petitioners replied to the said contentions. The petitioners have also filed written submissions and respondents have also filed written submissions. In view of the various contentions raised by the petitioners as well as the respondents and the affidavits filed from time to time, I will take up the contention of the petitioners and thereafter the contention of the respondents and thereafter further rejoinder of the petitioners in this behalf. Mr. Malkan, learned senior Standing Counsel appears on behalf of respondent No. 3.

CONTENTION OF THE PETITIONERS:

7. It has been contended by the petitioners that the petitioners have been working round the clock for 10 to 18 years continuously for more than 300 days during the last more than 10 years and for 365 days during 5 years are simply treated as part-time "volunteers" like ordinary rural/urban Home Guards and entitled to only a fixed pay and dearness allowance but nothing else - no leave, no permanency rights, no security of job, no retirement benefits even after 20 years of almost continuous service, no gratuity, no pension, no social security.

7.1 The petitioners contended that the petitioners are treating as only part-time so-called "volunteers" entitled only to fixed pay, dearness allowance and nothing else, even after round the clock continuous

service for 10 to 18 years amounts to denial of right to live with dignity under Article 21 read with Articles 39A(2), 41, 42, 43 and 46 of the Constitution of India. The petitioners further contended that though they are equal to full time members of Border Wing Home Guards in all respects, they are treated unequally, amounting to gross discrimination, violative of right to equality under Articles 14 and 16 of the Constitution of India.

7.1A The petitioners further contended that by treating them equally with ordinary rural/urban Home Guards though completely and qualitatively different in all respects amounts treating unequals equally and violation of Articles 14 and 16 of the Constitution of India.

7.2 It is the case of the petitioners that though the petitioners are appointed under the provisions of Bombay Home Guards Act, 1947 and the Bombay Home Guards Rules, 1953, really they are governed by the Government of India Scheme dated 29.6.1979 for all border States in India namely; Gujarat, Rajasthan, West Bengal, Tripura and Assam. For that purpose, they have relied upon the scheme introduced by Government of India dated 29th June, 1979, which is on page 430 of the petition (hereinafter referred to as " the Scheme").

7.3 It is the case of the petitioners, that a bare perusal of the scheme will clearly establish that all the important aspects of the Border Wing Home Guards viz., the origin, the constitution, the organisation, method of recruitment, tests, standards, training, duties, financial structure etc. are determined by the Scheme itself. However, for implementing the scheme, the statutory framework of the State Act viz. (In present case) Bombay Home Guards Act, 1947 and the Bombay Home Guards Rules, 1953, was used. Thus, the substance is derived from the Scheme itself while the form used is of the State Act. Originally rural/urban Home Guards who have been appointed under the Bombay Home Guards Act, 1947 and the Bombay Home Guards Rules, 1953, who numbered about 45,000 as determined by the State Government are different from the Border Wing Home Guards though formed under the same Act.

7.4 The learned counsel relied upon the provisions of the Scheme and also Appendix to the said letter which provides Organisational set-up, Strength of a Section, Uniforms, Office Furnitures and Equipment, Training Grants/Training Equipment, All Arms and Ammunition, Scales pertaining to authorisation of Ammunition, Scale

of POI Admissible for Planning, Basic Training, Refresher Training, Weapon Training, Advanced Training, Collective Training etc.

7.4A The petitioners' independent contentions is briefly as under:

(i) The petitioners have given all the possible details about the nature of work and duties of each of the 610 petitioners, viz, how they are appointed, when they are appointed, the duties performed by them, how many years they have been working and how they have been working during each year. Thus, the petitioners have made out a strong case giving all the details of each of the petitioners.

(ii) The facts presented by the petitioners are collected from the records, correspondence and the affidavits of the respondents in the present case and, therefore, they are not disputed questions of facts at all because all these facts are taken from their record and the respondents.

(iii) The petitioners' entire case is based upon the nature of the Scheme of Border Wing Home Guards and how it has been implemented or not implemented in their case, by referring to the facts of the case of 610 petitioners. In this regards, the question of going beyond the statutory framework of Bombay Home Guards Act, 1947 is already answered by the Hon'ble Supreme Court in West Bengal's case where even on the basis of the Scheme but considering the facts, the Court said that the voluntary character of the services of Border Wing Home Guards is completely lost.

WEST BENGAL'S CASE:

7.5 The petitioners contended that the petitioners' case is fully covered by the judgment of the Apex Court in the case of State of West Bengal Vs. Pantha Chatterjee reported in 2003(6) SCC 469.

7.6 It may be noted that this case i.e. Pantha case (supra) arose out of Part-time Border Wing Home Guards of West Bengal. When they dissatisfied with the condition of service under which they had been working and the

nominal emoluments paid to them, preferred petition before the Calcutta High Court complaining that they were being discriminated vis-a-vis other regular Border Wing Home Guards of West Bengal and the Border Security Force Personnel, as the respondent writ petitioners had also been performing similar duties and discharging same responsibilities.

7.7 It may be noted that before the Hon'ble Supreme Court, the Government of India has addressed a letter dated 15th October, 1976, and framed a scheme for Border Wing Home Guards Battalion. The scheme was sanctioned by Hon'ble President of India.

7.8 It may be noted that from the facts of the case, the said scheme which has been of 1976 in almost identical with the present scheme which I am referring of 1979. In view of the same, originally, the petitioners filed a petition before the Calcutta High Court. As found from para 4 of the said judgment, the learned Single Judge has given following findings:

(i) part-time members of the Border Wing Home Guards would be treated on a par with the whole-time staff of the Border Wing Home Guards.

(ii) they would get all the privileges of the State armed police as extended to the full-time Border Wing Home Guards.

(iii) all the benefits available to the West Bengal government servants, for example, fixation of pay, benefit of provident fund, gratuity, retrial benefits, allowances and leave etc. shall also be made admissible to the petitioners.

(iv) arrears of service benefits were also directed to be given to them since the time of their joining, and

(v) they were also directed to be absorbed irrespective of age bar which would stand waived. The judgment was to operate in rem covering all the part-time members of the Border Wing Home Guards.

7.8A Being aggrieved and dissatisfied with the said judgment, the State of West Bengal filed appeal before the Division Bench of Calcutta High Court. The Division Bench has confirmed the findings of the learned Single Judge, but only modified the order of the learned Single

Judge to the effect that the judgment was in rem and levy of costs of Rs.1000/- for each petitioner, was set aside.

7.8B Against the judgment of Division Bench, the matter went to the Hon'ble Supreme Court.

7.8C The Hon'ble Supreme Court examined the scheme and also provisions of the Bombay Home Guards Act, 1947, and the Rules, and in para 17 the court after considering the scheme on page 481 and page 482 observed as under:

7.8C(i) "para.17 On the basis of the Scheme, as promulgated by the Government of India, the State Government with the sanction of the Governor of West Bengal raised the battalion of Border Wing Home Guards, as indicated earlier and they were to be paid from a given head of expenditure of the State Government. The Scheme, however, makes it clear that the expenditure incurred would be reimbursed by the Central Government. The Central Government should not and cannot get out of this undertaking. It is no doubt true that the State of West Bengal being in the position of an employer of the respondent petitioners, owes the primary responsibility of making all the payments on account of salary, allowances and other perquisites to them as admissible to the permanent staff of the Border Wing Home Guards but this burden of expenditure must be ultimately borne by the Central Government. The petitioners have been guarding the borders of the country assisting BSF in checking the infiltration from across the border. The petitioners have been working and discharging their duties under the control of the authorities of the Border Security Force. We also find that the Central Government cannot shed its responsibility by raising a lame plea that it was because of the State Government that voluntary character of the engagement of the writ petitioners, as per the Scheme, was lost. In our view, the primary responsibility for deployment for such a long duration squarely lies upon the Central Government. The deployment was envisaged to be for a period of 3 months, to be continued, only if necessary as may be assessed by the authorities of the Border Security Force. The authority to continue the deployment beyond the period of 3 months was entrusted to the responsible authorities of the Border Security Force by the Central Government itself. There is no dispute that the writ petitioners were

continued accordingly. In such a situation the State Government hardly had any choice in the matter to cease or withdraw the deployment engaged in the job of patrolling of borders under operational control of BSF."

7.8D Ultimately in para 19 on page 482 the Apex Court issued following directions and dismissed the appeal.

"para 19. ... In this regard we make the specific directions to the effect that: (i) The State Government shall carry out the order passed by the High Court and clear all the consequential monetary benefits to the respondent writ petitioners within a period of 3 months from today with statement of account to be forwarded to the Central Government for reimbursement. (2) The Central Government within two months of the receipt of the said reimbursement statement shall reimburse the amount to the State of West Bengal. (3) In case there is any dispute or confusion in regard to the actual amount payable on account of reimbursement or otherwise, the same shall be sorted out between the State of West Bengal and the Central Government at the earliest but that would not be the cause of delay in payment as indicated above. (4) That there shall be no delay in payment to be made as scheduled above by the State of West Bengal to the petitioners nor by the Central Government to the State of West Bengal on account of reimbursement which may be subject to final settlement; in case of any dispute or doubt about the same, to be sorted out sooner or later between them."

8.1 The Hon'ble Supreme Court in West Bengal case has considered that the part-time Home Guards were working in the same way as the full-time staff and did not say that a lower grade of part-time Border Wing Home Guards would be doing the same duties as a higher full-time staff. What the Supreme Court did was that the full-time staff Border Wing Home Guards was performing duties appropriate to their ranks as per the Scheme for the whole year and the full-time basis. Similarly, the part-time Border Wing Home Guards were performing duties as per their ranks on a full-time basis and for all these years. The part-time Home Guards like the petitioners demand the same pay scales and benefits which are given to the appropriate ranks in the full-time staff corresponding to the people in the State Armed Police, as prescribed by

the Scheme. For example, just as some of the petitioners are guardsmen, there are guards in the full-time staff and yet both are treated unequally. Similarly, there are Nayaks both part-timers as well as full-timers and both are working in the same way and yet they are treated unequally. Similarly, there are Havaldars in both part-timers as well as full-timers and yet they are treated unequally. This is a gist of the petitioners' grievance and this is what the petitioners' demand i.e. de facto the petitioners are working like full-time staff of the Border Wing Home Guards, the petitioners must be given same treatment de jure.

8.2 The facts of the present case and the facts of West Bengal case are almost identical both involve the question of respective similar Home Guards Act, the same Government of India's scheme for border States, the non-implementation of the Scheme, continuance of the petitioners for full-time duties and for long period and, therefore, and the same treatment as that of full-time staff.

8.3 The present petition is in relation to 610 petitioners and similarly situated Border Wing Home Guards in other related petitions to be jointly heard. The reliefs the petitioners claim are to be confined only to these petitioners. The petitioners do not pray and claim any benefit for 45,000 Home Guards in general because the petitioners' case is that they are completely different from the normal rural/urban Home Guards numbering about 45,000 in the State.

ARTICLE 21:

8.4 The learned counsel for the petitioners has relied upon the provisions of Article 14 and Article 21 of the Constitution of India and also certain directive principles. Learned counsel for the petitioners has stated that Article 21 of the Constitution of India, namely; right to lift has been expanded by the Supreme Court in several cases that citizen has to live with one dignity. He further submitted that once the petitioners contended and proved that there is a violation of Article 14 and also Article 21 of the Constitution of India i.e. right to life as expanded by the Supreme Court in various cases, there is no limitation on the power of the High Court under Article 226 of the Constitution of India, and the relief which has been prayed by the petitioners is complete relief and this Court may give justice to the petitioners.

8.5 In support of the aforesaid contention that Article 21 of the Constitution provides right to dignity, the learned counsel has relied upon following judgments:

8.6A In the case of Francis Coralie Mullin Vs. The Administrator, Union Territory of Delhi and others reported in AIR 1981 SC 746, particularly para 6 and 7 on page 752 and 753 which reads as under:

"para.6 Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.

"para.7 But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

8.6B In the case of Bandhua Mukti Morcha Vs. Union of India and others reported in AIR 1984 SC 802 particularly para 10 where the Apex Court has relied upon earlier judgment of Frances Mullin's case (supra) which I have referred where the Apex Court has further stated in para 10 on page 811 and 812 as under:

"para.10 .... This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Articles 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State - neither the Central Government nor any Statement Government has the right to take any action which will

deprive a person of the enjoyment of these basic essentials."

8.7 The learned counsel for the petitioners has relied on Article 39 of the Constitution of India which provides that certain principles of policy to be followed by the State that the State shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means to livelihood, Article 41 of the Constitution provides right to work, to education and to public assistance in certain cases. Article 42 of the Constitution provides provision for just and humane conditions of work and maternity relief. Article 43 of the Constitution provides living wage etc. for workers. Article 46 provides promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker Sections.

9. Relying on the scheme of the Act and the judgement of the Hon'ble Supreme Court, the learned counsel for the petitioners has made the following submissions:

9.1 The petitioners have also contended that they have made out a strong case as pointed out following factors which support their case.

(i) What the petitioners have pleaded in the petition and what the petitioners have averred regarding the facts of their case are taken from the records, correspondence and the affidavits filed by the respondents.

(ii) The 610 petitioners of the present petition belong to No.2 Battalion - "B" for Kachchh-Bhuj. The details of each petitioner are given in Annexure-B (page 38 onwards). The said annexures shows the names of all the petitioners, their sanad number, the designation, the birth date, age, date of recruitment, training and the percentage of presence every year. This table is certified by the Company Commander. This table at Annexure-B is important particularly for three things: (i) the designation of each petitioner which he is holding, (ii) from which year they are working, and (iii) percentage of their presence throughout the year for each of these years which is almost 84% to 90%.

(iii) The table at Annexure-B would show that

all the petitioners except 48 have been recruited from 1980 onwards and before 1995 and all have therefore put in more than 10 years of service. The 48 persons in the table were recruited after 1995 as under:

39 in 1995
1 in 1996
2 in 1997
5 in 1999 &
1 in 2000

48

(iv) The method of recruitment of the petitioners is in detail described in para 8 on page 17 and it is not disputed by the respondents. Two specimen copies of the appointment orders are given in Annexure-A (Page 36). This will show that all the petitioners have been regularly recruited as per the procedure adopted by the Government after inviting names, test, interview, fulfillment of physical and other standards, training and regular appointment orders. Thus, it is also admitted by the respondents that after fulfilling the educational and physical standards, the petitioners have been recruited. (Para 17 - page 109). Thus, the petitioners appointment as Border Wing Home Guards is perfectly legal, regular and proper after complying with the procedure and selection and their appointment is not irregular nor illegal nor contrary to the method of selection and not by way of back-door entry.

(v) All the petitioners were directly appointed as Border Wing Home Guards from the respective years of recruitment. Before their recruitment as Border Wing Home Guards, they were not working as ordinary Home Guards and thus, none of them has been taken from the regular rural/urbal Home Guards. (See page 149) which shows a chart containing "A" company year of working yearly embodiment and yearly disembodiment and Number of days showing disembodiment. The learned counsel for the petitioners has relied upon the affidavit of Gajaji Kupaji Jadeja dated 2.1.2004 particularly para 8 and para 9 where the petitioner has reiterated earlier facts which have been set out

in this behalf and other correspondent ensue between the department, and it has been reiterated that in view of scheme of Border Wing Home Guards in Gujarat which clearly contemplates steps were required which provides state units as ancillary to defence board and in checking and preventing infiltrators.

(vi) The selection of the Battalions, the organisation and the strength of the 2 Battalions in Gujarat originally established are determined by the Scheme and are described on page 105(9) their reply and page 443. Thus, battalion No.2 to which the petitioners belong includes 6 Companies known as "A" (Alfa - 101 members), "D" (Bravo - 104 members), "C" (Charlie - 101 members), "D" (Delta - 100 members), "E" (Echo 99 members) and "F" (Foxer 105 members). All these are described as part-time Guardmen. The total is 708. As per the Scheme, each Battalion has 6 companies, each Company has 3 Platoons, each Platoon has 3 Sections and each Section has 3 Guards. It is also specified in the Scheme that each Company will have 118 guardsmen and 10 full-time members. The scheme itself describes the number of full-time members and the number of part-time guardsmen and the various designations.

(vii) The scheme specifically provides that recruitment of Border Wing Home Guards will be from border areas within 5 to 15 miles from the international borders and any deviation must be after consultation with the Central Government. The petitioners also have been recruited from the border areas of Kachchh and Bhuj. (See the Scheme at page 430 and the respondents' reply on page 224, para 2).

(viii) Pay Scale : The pay scale of the Border Wing Home Guards is also determined by the Government of India under the Scheme. The full-tile members of the Border Wing Home Guards are to be given the pay scales of the State Armed Police. So far as the part-time Border Wing Home Guards are concerned, normally they are paid honorarium but during the period of embodiment (i.e. when they are actually working) and during training, they will be paid pay scales at the minimum scale appropriate to their ranks and rolls in the State Armed Police. (See page 140 Government of India's letter dated 4.10.2003)

addressed to Chief Secretariats of all Border States. They are equated with their ranks with the State Armed Police. (page 110 - para 19 their reply). They are also paid the scales of 4th and 5th Pay Commissions. (page 16, para 7 and page 19).

(ix) Expenses : As per the Scheme, 75% expenses of the establishment will be borne by the Central Government and 25% by the State Government. (See Scheme - page 431 and admitted by the respondents on page 224). The Scheme also provides that if the Border Wing Home Guards are to be used by the State Government for their own purposes, that would be only after previous clearance from the Central Government and 100% expenses will be borne by the State Government.

(x) Duties : The Government of India's Scheme of 1979 specifically provides the purpose for which the special duties to be entrusted to the Border Wing Home Guards in addition to the duties of normal Home Guards. These duties are patrolling, preventing infiltration, watching border movements, smuggling, law and order in border villages, keeping morale of the people in the border villages etc. The special duties are border duties connected with the national security and by way of working as auxiliary to Border Security Force. (See Government of India's Scheme page 432). The important points in connection with the special duties of the Border Wing Home Guards are as under:

a. The entire Scheme of the Government of India is not given by the respondents who in their affidavit say that such disclosure would jeopardies national security. (Page 115 - para 25).

b. Border Wing Home Guards are to be recruited from border areas, and, therefore, no rural Home Guards are appointed in the border areas. (Page 108 - para 13).

c. Border Wing Home Guards are used in emergencies, for example, Kargil war, infiltration of terrorists through rann and coastal areas. (Page 112 - para 20).

d. The Border Wing Home Guards are used whenever national security demanded, such as threat of war. (Pages 116-117, para 27).

e. The large number of correspondence from the officer to the lower strata have been produced by the petitioners on page 280 onwards which throw light on the nature and the kinds of duties performed by the Border Wing Home Guards in relation to the borders and border areas and the method of working under Army or Border Security Force, etc. (The letters are addressed by Battalion Commandant to Company Commandant).

f. The Border Wing Home Guards has been described as paramilitary force. (See letter of 4.7.1995, page 206 and 207). (These letters are addressed by Battalion Commandant to Platoon Havaldar).

g. It has also been admitted by the respondents that the Border Wing Home Guards have worked as auxiliary to Border Security Force from 1986 to 1992. (See page 444).

h. They are working under the direct control of Army in times of emergencies on the border. (See letters of 22.1.2002 and 31.5.2002 - page 439 & 440 letters addressed by Battalion Commandant to Company Commandant).

i. The petitioner Border Wing Home Guards have been posted on or near the borders for performing various kinds of border duties and the distance of the outpost at which they were posted is described on page 423.(Show the distance and station).

9.2 Training: The specific training appropriate to the Border Wing Home Guards is prescribed by the Scheme of the Government of India which requires regular and continuous training. This training is mandatory and not irregular or intermittent. (See pages 330, 381, 437 and 438). The mandatory character of the training is emphasised by the respondents themselves on page 142

though they contradict themselves by saying that the training is not mandatory but it is irregular and intermittent. [page 381 - (vii)]. It has been reiterated by the petitioners in the affidavit of Gajaji Jadeja dated 2.1.2004 particularly pages 415 to 417 in which it has been stated that none of the petitioners herein to pursue their vocation right from their inception and in fact advance training as contemplated in scheme of Border Wing Home Guards in Gujarat is given to petitioners and even training given to the petitioners various topics i.e. basic training, collective training and advance training.

9.3 Embodiment and Disembodiment:

(i) The policy of the Government of India includes the concept of embodiment and disembodiment and the purpose of disembodiment at regular intervals was to impress upon the Border Wing Home Guards of the voluntary character of the services. There is no dispute regarding the concept of embodiment and disembodiment so far as the Scheme is concerned.

(ii) The very concept of embodiment and disembodiment is peculiar to the Border Wing Home Guards who are to be engaged for a long period but this concept is alien to the normal rural/urban Home Guards working in the State who are called out for duty for very short period, sometimes a day or two or a few days for performing civic duties.

(iii) The policy also includes the minimum number of days the Border Wing Home Guards are to be disembodied but this was not done continuously, and therefore, letters were written to the officers to comply with the standards of disembodiment. These letters are at Annexure-C letters of 3.2.1993 and 5.9.1997 addressed by Battalion Commandant to Company Commandant (page 83, 84). These letters are very important for the purposes of the petitioners' case as they point out that the petitioners were not disembodied for long even though policy might have required it.

(iv) Even during emergencies, the period of regular disembodiment has been drastically reduced to 10 days. (see page 369 - letter dated

21/25.9.2002) addressed by Battalion Commandant to Company Commandant).

9.4 The petitioners' case is based upon the facts of the present case, viz, that though the embodiment and disembodiment are part of the Government of India's Scheme, the petitioners were not disembodied for very long periods and were required to work continuously on full-time basis for very very long period. The petitioners have substantiated this on the following data:

9.5A The table at Annexure-B shows the name of employee, serial no, designation, date of birth, date of employment, year of training and also No. of percentage of presence of each of the petitioners. The table reveals that in no. of cases present is more than 90%.

9.5B The respondents' table at page 92 onwards showing the company-wise embodiment.

9.5C The respondents' table on pages 149 to 160. (This table shows the name of company, yearly embodiment, yearly disembodiment and no. of days of disembodiment).

9.5D The petitioners' chart prepared on the basis of the respondents' table from 1985 to 2003. (Page 362/363) (For Company `A', Year, Present of Embodiment and Present of Disembodiment).

9.5E The petitioners' continuous engagement every year. (See pages 226 to 228). This shows year, specification of the emergent situation, requisition for Central and State Government.

9.5F All these tables show that the petitioners have worked for 300 days in last 15 years and 365 days in 5 years. This is admitted by the respondents on page 233 by saying that simply because for some time they have been engaged for more than 300 days does not change the character of their services.

9.5G The long time embodiment of the petitioners has not been denied by the respondents. (See pages 381, 387 and 388). The respondents have stated that for various reasons such as emergencies and disturbances, the petitioners were required for long period.

9.5H The concept of embodiment and disembodiment is in relation to a Company, and the respondents have given data regarding company-wise embodiment and disembodiment.

When it was pointed out that the petitioners have been working through out the year for large number of years, the respondents have come forward with a new defence that though the company might have embodied, the individuals may have been disembodied but they have not even cared to give some examples out of 610 petitioners to show that these people were disembodied for a long period. They simply makes a sweeping statement that individuals may have been disembodied. The complete date are with them and they could have easily disproved the petitioners' case. On the other hand, the petitioners have shown in their table "B" (page 38) the percentage-wise presence of each petitioner in a year and they have not disproved it by giving some data regarding even few petitioners.

9.5I The petitioners' averment is that they have been paid for all this period. Now if the respondents' contention is that the individual guardsmen might have been disembodied and were disembodied, naturally they would not have been paid for the days of embodiment. As against this, the petitioners' say is that they have been paid. If the Government's contention is right, the respondent Government would have come out with the audited statement showing how many guardsmen were not actually paid for how many days. These auditor's statements are required to be submitted to the Central Government under the Scheme but the respondents have not done any of these things. No common man would say that he has been paid though he is not actually paid. It is the duty of the respondents to show that the Government has not paid to the individual guardsmen during the period of disembodiment and if they have been disembodied and yet paid, the serious question arises to whom the payment was paid. The petitioners have made specific averments and allegations regarding this on page 418 (para 20) and page 427 on para 32 and respondents have not denied it.

9.5J Even their own letters show that because of the petitioners' long embodiment, the petitioners were not able to discharge their domestic duties and, therefore, the letters pointed out that at least the petitioners should be allowed to go home for doing their domestic duties. Reference of these letters dated 3.1.98, 8.7.98 28.12.98 and 18.12.2001 are made on pages 270 and 271. Petitioners have also referred to letter dated 13.4.98 addressed to Deputy Commandant to Company Commandant (Page 340) and letter dated 4.7.98 addressed by Battalion Commandant to Company Commandant (Page 372).

9.5K The petitioners' case is that they have continued

to work on full-time basis from year to year - 300 days for last 10 to 15 years and for 5 years for 360 days. Therefore, there was no scope for the petitioners for going back to their home and assume their normal occupation or business. The Scheme theoretically does envisage this that Home Guards should be called for duty on some occasions and afterwards they can always go back for their personal work. This is why an undertaking was required for normal rural/urban Home Guards when they were appointed as Home Guards. Such normal rural/urban Home Guards are expected to discharge civic duties as citizens, and therefore, even persons serving in private jobs may also volunteer to work as Home Guards and the volunteers only because such rural/urban Home Guards are called for duties on few occasions on a very few days, such as traffic duties and sometimes for local disturbances. In such a case, it is understandable that as soon as their work is over, they go back to resume their private work but in the case of the petitioners, they were required to perform duties round the year on full-time duties for large number of year. It would be practically impossible for them to go back to their villages and to resume their normal occupation because the Border Wing Home Guards are required to work even for very long period. The letter pointed out by the petitioners regarding minimum number of days at page 83 shows that the minimum number of days of disembodiment should be 10 days in 3 months. Even this was not complied with but even if the persons are required to be disembodied for minimum number of 10 days in 3 months, it is inconceivable that they would be able to resume their occupation for 10 days in 3 months. These 10 days really meant for discharging their family duties and not for normal occupation which is impossible.

9.5L All these important points mentioned above would clearly show that the petitioners have made out a very strong case giving full details about the age of the petitioners and this goes to prove beyond any reasonable doubt that though the scheme of the Government of India 1979 was never fully implemented in practice, the petitioners were appointed as per the policy, performed their duties as per the policy, worked continuously, were paid as per the policy, they were required to continue to work on full-time basis for 10 to 18 years and thus so far as the embodiment and disembodiment is concerned, they were not disembodied and thus the so-called voluntary character of their duties is completely destroyed.

9.5M The petitioners' only prayer is that just as the

Calcutta High Court and the Supreme Court have looked to the substance of the case of the part-time Border Wing Home Guards in West Bengal and not to the formal statutory framework of the West Bengal Home Guards Act. Similarly, this Court should look to the substance of the petitioners' case and to the similar statutory framework of the Bombay Home Guards Act, 1947. What the petitioners pray is justice according to the Constitution by piercing through the form and the structure and not merely justice according to form and technicalities. While given constitutional justice to the petitioners on the ground of fundamental rights, the financial considerations are never accepted by the Supreme Court as constraints and obstacles in the granting of justice. In this situation, both the Central Government and the State Government did not stick strictly to the Scheme of the Government of India and continue to require the services of the petitioners for all these years on full-time basis and now they cannot be permitted to get out or escape because of their own failure, just as the Supreme Court has stated that the Central Government cannot take advantage of its own failure.

SUBMISSIONS OF MR.KAMAL TRIVEDI, LEARNED ADDITIONAL ADVOCATE GENERAL ON BEHALF OF THE RESPONDENTS:

10. Mr.Kamal B.Trivedi, learned Addl.Advocate General and Senior Advocate along with Ms.Sangeeta Vishen, learned AGP appeared on behalf of the respondents No.1 and 2. Though I briefly narrated his submissions, however, now I am dealing with his submissions in detail.

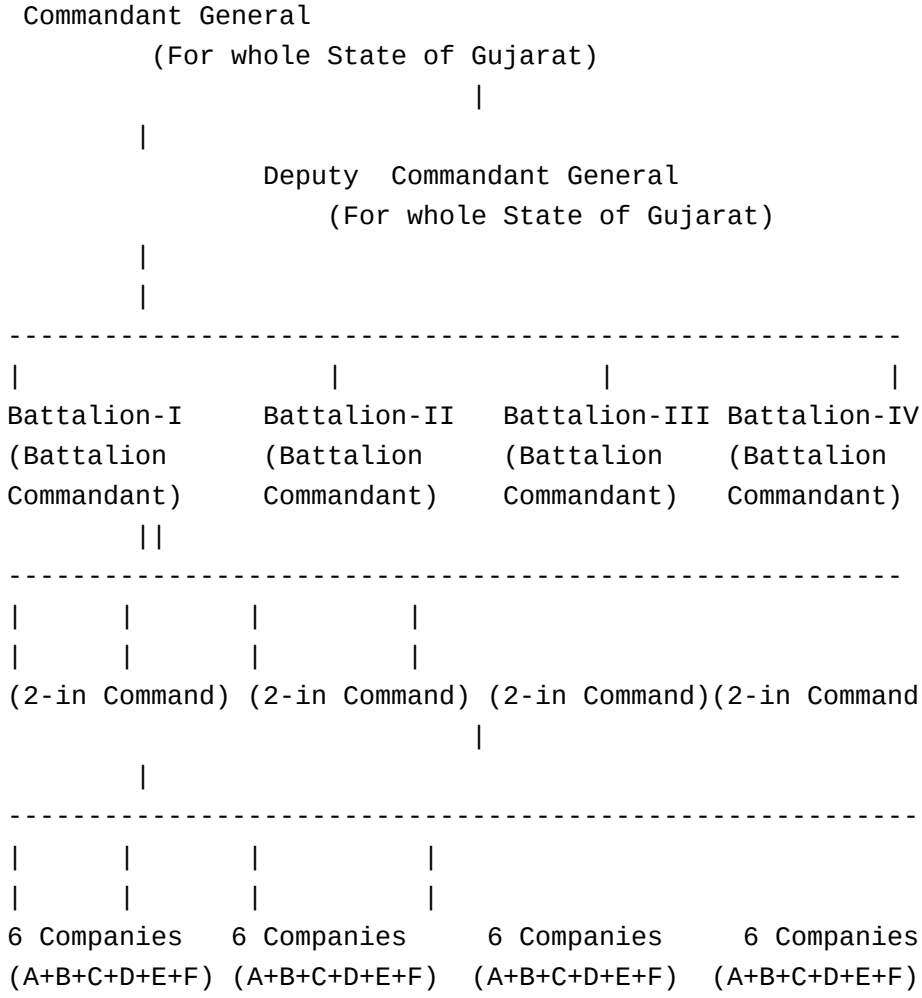
10.1 The learned counsel for the respondents has relied upon Bombay Home Guards Act, 1947. He submitted that the Bombay Home Guards Act, 1947, was enacted to provide for the constitution of Home Guards. The object of the Act is to provide for a voluntary organisation for use in emergencies and for other purposes in the State. He has relied upon Sec.2 of the Act which provides Constitution of Home Guards and appointment of Commandant (Commandant General and Commandant). He has also relied upon sec.2(1) of the said Act. Sec.3 provides that the Commandant General may appoint as members of the Home Guards such number of persons, who are fit and willing to serve, as may from time be determined by the State Government, and may appoint any such member to any office of command in the Home Guards. Sec. 4 provides the Commandant may at any time call out a member of the Home Guards for training or to discharge any of the functions or duties assigned to the Home Guards in accordance with the provisions of this Act. Section 8 provides that the

State Government may make rules consistent with this Act providing for the exercise by any officer of the Home Guards of the powers conferred by Section 4 on the Commandant and the Commandant General providing certain eventualities.

In exercise of the powers conferred by Sec.8 of the Act, the then Government framed the rules known as Bombay Home Guards Rules 1953.

10.1A The learned counsel has also relied upon Rule 3 of the Bombay Home Guards Rules, 1953 which provides appointment of member of Home Guards. Rule 4 provides application for appointment. Rule 6 provides Form of the application and Rule 16 provides Functions and duties of members of the Home Guards.

10.2 After relying upon the same, learned counsel has submitted a chart showing the Set Up of Border Wing Home Guards:



10.3 To simplify the aforesaid chart, the hierarchy starts with the Commandant General, Home Guards (for the whole of the State of Gujarat in respect of Urban Home Guards, Rural Home Guards and Border Wing Home Guards). Under him there is the Deputy Commandant General and under his command there are 4 Battalions, each headed by Commandant. Thus, there are 4 Battalions of Border Wing

Home Guards in the State, each of them has 6 Companies and each Company has 118 members. The 4 Battalions are set out hereunder:

(i) No.1 Battalion Border Wing Home Guards Palanpur, Banaskantha Districts.

(ii) No.2 Battalion Border Wing Home Guards Bhuj-Kutch District.

(iii) No.3 Battalion Border Wing Home Guards - Jamnagar District (Raised in the year 2000).

(iv) No.4 Battalion Border Wing Home Guards Naliya-Kutch District (Raised in the year 2002).

Re: Disputed Questions of Fact:

10.4 Learned counsel submitted that the petitioners have filed this petition under Article 226 of the Constitution of India seeking to invoke the extra-ordinary jurisdiction of this Court involves highly disputed questions of fact in respect of the following material aspects not borne out from the record of the petition, requiring a detailed inquiry by the leading of evidence, oral as well as documentary, before the appropriate forum.

10.4A The learned counsel submitted that some of the disputed questions of fact, according to which the respondents have averred in the affidavit-in-reply as under:

(i) None of the petitioners was ever required to be actually physically posted on the International Border at any point of time.

(ii) Practically all the time, the petitioners were required to work at various cities and towns like Kandla, Bhuj, Mandvi, Porbandar, Bhavnagar, Jamnagar, Rajkot, Ahmedabad, Gandhinagar, Anand, Surat etc., just like Urban/Rural Home Guards. It is denied that petitioners are required to work all round the year.

(iii) It was denied that the services of the petitioners are not comparable with those of the Border Security Force personnel.

(iv) It was also stated that by the very

nature of their appointment as Home Guards, petitioners are liable to be embodied when the requirement arises and liable to be disembodied when there is no requirement.

(v) There is no qualitative difference between Urban, Rural and Border Wing Home Guards. The nature of duties of the petitioners is in no way comparable with the nature of duties being performed by regular Border Wing Home Guards.

10.5 In support of the aforesaid contention, the counsel for the respondents has relied upon the following authorities:

(1) In the case of Bharat Ram Meena Vs. Rajasthan High Court at Jodhpur and others reported in (1997) 3 SCC 233, particularly paras 13 and 14 on page 237 where the Hon'ble Apex Court observed that nothing has been brought on record to justify the Court in exercise of its writ jurisdiction to intervene and quash the adverse remarks in the Annual Confidential Reports of the appellant.

(2) In the case of State of Bihar and others Vs. Jain Plastics and Chemicals Ltd. reported in (2002) 1 SCC 216 particularly para 7 on page 218.

(3) In the case of Manager, St.Thomas U.P.School, Kerala and another Vs. Commissioner & Secretary to General Education Department and others reported in (2002) 2 SCC 497 particularly para 6 the Supreme Court held that Hon'ble Court should not decide a disputed questions of fact without the benefit of a full-scale trial.

(4) In the case of U.P.State Bridge Corporation Ltd. and others Vs. U.P.Rajya Setu Nigam S. Kamdar Sangh reported in (2004) 4 SCC 268 particularly para 14 on page 277 the Hon'ble Apex Court observed that it is an established practice that the Court exercising extra-ordinary jurisdiction under Article 226 should have refused to do so where there are disputed questions of fact. In the present case, the nature of the employment of the workmen was in dispute. ... This was an issue which should have been resolved on the basis of evidence led.

10.6 The learned counsel further submitted that the respondents are seriously disputing the following questions of fact namely;

(a) Actual nature of duties being performed by each of the petitioners.

(b) Comparison of petitioners being the part-time members of the Border Wing Home Guards with those in Regular (full-time) Border Wing Home Guards in terms of designation as well as performance of actual duties.

(c) Comparison of the actual nature of duty being performed by the petitioners with those employed by the State Reserve Police.

(d) Qualification of each of the petitioners.

(e) Age of the petitioners belonging to "F" Company and their engagement for the first time as a member of Border Wing Home Guards (BWHG for short).

(f) Exact number of days in each year when each of the petitioners remained embodied as well as disembodied.

(g) It is submitted that all throughout in the petition what is highlighted by the petitioners is the period of embodiment and disembodiment of in all 6 Companies of the 2nd Battalion and not of individual case of the petitioners.

Characteristics of Engagement of petitioners as BWGHs.

10.7 The learned counsel for the respondents further submitted that the main characteristic of the engagement of petitioners as Border Wing Home Guards. They have relied upon the Bombay Home Guards Rules 1953. They have also referred to the scheme dated 29th June, 1979, in this behalf.

10.8 After relying upon the aforesaid basic document, the learned Addl.Advocate General has raised following contentions:

10.8A The petition raises highly disputed questions of facts and this Court under Article 226 of the Constitution of India would not enter into the disputed questions of facts and would ask the petitioners to go to the Civil Court or any other appropriate forum.

10.8B The learned counsel therefore relied upon the affidavit filed by one Major Yashoraj Sinh Gohil, Battalion commandant, 1st Battalion, Border Wing Home Guards at Palanpur (B.K.), dated 3.12.2003, particularly para 3 where main characteristics of the petitioners have

been set out in this behalf. The learned counsel for the respondents stated that as the respondents are raises disputed questions of fact, proper forum will be civil court or CAT where both the parties can adduce their oral as well as documentary evidence. It was further submitted that the appointment of petitioners are made pursuant to the Bombay Home Guards Act and the Rules and, therefore, it is not legally permissible for the petitioners to ask for something which is beyond the statutory provisions. It was further submitted that the 610 petitioners have neither filed separate writ petitions nor given details in respect of each of the individual petitioners. It was denied that the petitioners were never enrolled as members of Home Guards right from 1985 as sought to be presented on behalf of the petitioners inasmuch as many of the petitioners were so enrolled as late as in the year 1995. It was further submitted that the petitioners have worked as an auxiliary force in the outposts areas and thus there has never been a question to require them to work on the international border all round the year. It has been further pointed out that none of the petitioners was ever required to be actually and physically posted on the international border. They have been required to work at various places like Kandla, Bhuj, Mandvi, Porbandar, Bhavnagar, Jamnagar, Rajkot, Ahmedabad, Gandhinagar etc. They were required in connection with law and order situation because of riots, disturbed situation in some parts of the country because of territorist activities, riots as an aftermath of demolition of Babri Masjid, rescue, relief and rehabilitation and security of property as an aftermath of Kutch earthquake and cyclone and communal riots in certain parts of the State of Gujarat. It was further submitted that the petitioners cannot pretend that their nature of duty is just like that of BSF and other Army personnel.

10.8C The learned counsel further submitted that the petitioners are not the members of "Paramilitary Force", as per Ex-Servicemen (Re-employment in Central Civil Service and Posts) Rules, 1979 (Re. page 385). The learned counsel further submitted that the petitioners are just like "Rural Home Guards" and "Urban Home Guards", who are enrolled as such under the same legislative provisions referred to above within the overall sanctioned strength of Home Guards in the State. They have never been posted at the actual international border. (See. page 380). Their place is as per exigency of requirement (See page 226-228).

10.8D The learned counsel further submitted that the

petitioners are entitled to fixed honoraria per month at the minimum scale appropriate to their ranks and trade in the State Armed Police ranging from Rs.7000 to Rs.10,000/- plus other facilities, including D.A. (now at the rate of 64%) when they are embodied or on training. (See page 140 and 229 to 231).

10.8D/1 It was further submitted that the expense of the monthly honoraria payable to the petitioners is being taken care of by the State Government so long as they are assisting the Gujarat State Police Force. However, in case of full-time regular members of BWHG in case of each Company, their emoluments are paid initially from the State exchequer but ultimately 75% thereof is reimbursed by the Central Government.

10.8E The learned counsel further submitted that the disembodiment of Home Guards is always Company-wise as well as individual wise. (See pages 232, 379). The learned counsel therefore submitted that the deponent in their affidavit namely Major Yashorajsinh Gohil, in the affidavit dated 4th November, 2003, has clearly stated that as and when the services of the petitioners are not required, they are being disembodied so as to enable them to pursue their respective vocation during the period of disembodiment, which is the real objective of the voluntary character of the serviced of Home Guards. Such a phenomenon cannot be allowed to be branded to be an artificial break as sought to be alleged by the petitioners. It was further stated that in reality disembodiment of Home Guards is always company-wise as well as individual-wise. Thus, on the basis of the statement provided by the deponent in its earlier affidavit, the petitioners cannot and should not conclude like this. It has been specifically denied that there is no training provided to them to discharge their duties at international border, as alleged or that they are required to work all round the year in this behalf. It was further pointed out that just, fair and reasonable conditions of service of the petitioners are very much in place as discussed and it was denied that they are required to work for more than 300 days in a year.

10.8F The learned counsel has relied upon the order of the Hon'ble Supreme Court in the case of Rameshwar Das Sharan Vs. State of Punjab - order of Hon'ble Supreme Court in Writ Petition SLP No.12465/90 decided on 30.7.1991, where the Hon'ble Supreme Court has observed as under:

"Heard petitioner in person and learned counsel

for the respondent. The counter affidavit indicates that the Home Guards who are ordinarily Army personnel are employed in the basis of temporary need from time to time and in case they are called back to do work with army in hands, they are paid at the rate of Rs.30/- per day on the basis of eight hours' working during the day, or otherwise they are paid at the rate of Rs.25/per day. Petitioner, according to the respondent, being an employee under this system cannot ask for regularisation. In such circumstances, we do not think that the petitioner is entitled to any relief. We have impressed upon learned counsel, however, to find out from the Home Guard Organisation if in any manner, the petitioner can be accommodated in a limited way.

The special leave petition and the interlocutory application are disposed of accordingly. No costs."

10.8G The learned counsel for the respondents has also relied upon the judgment of Central Administrative Tribunal, Chandigarh Bench in the case of Raj Kamal Vs. Union of India in O.A.No. 1013/1998 dated 31.1.1995. (See page 239 to 253).

Petitioners do not deserve Regularisation:

10.8H The learned counsel has further submitted that the petitioners do not deserve regularisation. In support of the same, the learned counsel submitted that the petitioners are the part-time members of a voluntary organization i.e. Border Wing Home Guards and governed by the provisions of the Bombay Home Guards Act, 1947 and the Rules of 1953. They are not entitled to be fitted into regular post of Permanent Full-time members of Border Wing Home Guards, unless more regular posts are created, budgetary provisions are made, financial capacity to bear the burden is examined and regular recruitment is made. Thus the petitioners are not entitled to be regularised as prayed for by them. This apart any direction to regularize them will amount to re-writing the provisions of the Bombay Home Guards Act, 1947 and the Rules of 1953.

10.8I In support of the same, the learned counsel for the respondents has relied upon the following authorities:

(1) In the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others reported in (1992) 4 SCC 99 - relevant paras 23 and 24 on Page 111 and 112 where the Hon'ble Supreme Court refused the request of the petitioners that the respondents be directed to regularise them.

(2) In the case of State of U.P. and others Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh and another reported in AIR 1996 SC 708 particularly para 3 where the Hon'ble Supreme Court held that we cannot uphold the direction issued by the High Court to pay equal wages or to regularise their services.

(3) In the case of State of U.P. and others Vs. Ajay Kumar reported in (1997) 4 SCC 88.

(4) In the case of K.D.Vohra and others Vs. Kamleshbhai Gobarbhai Patel reported in 2003(1) GLH 312 Division Bench judgment of this Court relevant paras 8.2 on page 333, para 11.7 power of regularisation on page 340 and ultimately para 17 on page 345 and para 26 on page 352 where this Court has held that these ad hoc lecturers cannot be directed to be continued contrary to the recruitment rules, nor can they be ordered to be regularised by any mode not warranted by the statutory rules governing the appointments to the cadre of Lecturers. 11.7, 26.

No parity between part-time and full-time (Regular) BWHGs:

10.8J The learned counsel further submitted that there is no parity between part-time and full-time (regular) Border Wing Home Guards. Each of the 6 Companies, 2nd Battalion has about 118 part-time members totaling to the tune of 708 as authorised part-time Border Wing Home Guards. (At the material time there were 610 such persons who filed the captioned writ petition). It was further submitted that the said 118 part-time members of Border Wing Home Guards in one Company are placed in the following designation with their strength mentioned against the same.

Platoon Havaldars 3
Section Leaders 9
Assistant Section Leaders (Lance Naik) 9
Runners (Message Carrier) 3
Home Guards 90

Cook 2
Water Carrier 2

118

10.8K It was further submitted that as against the above strength of 118 part-time members of Border Wing Home Guards in one Company, there are as aforesaid 10 regular/permanent members of Border Wing Home Guards who are placed under the following designation with the strength mentioned against the same:

Subedar Company Commander 1
Naib Subedar Platoon Commander 3
Quarter Master (Havaldar) 1
Naik Clerks 1
Driver MT 1
Despatch Rider 1
Chowkidar 1
Sweeper 1

10

10.8L It was further submitted that neither the designation nor the actual nature of duty being performed by the petitioners belonging to the 2nd Battalion of Border Wing Home Guards of various designations referred to above are comparable with those belonging to full-time (regular) members of Border Wing Home Guards by any stretch of imagination.

10.8M It was further submitted that in order to claim a relief of parity on the basis of the alleged equality, it is for claimants (the petitioners) to prove and substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on par with the other group of regular/permanent members of Border Wing Home Guards. In view of what is stated hereinabove, there arises no question of comparison between the petitioners and the full-time (regular) Border Wing Home Guards and the consequently no question of equal pay for equal work.

10.8N In support of the aforesaid contention, learned counsel has relied upon the following authorities:

(1) In the case of State of Madhya Pradesh and another Vs. Pramod Bhartiya and others reported in (1993) 1 SCC 539, particularly para 12 on page 546 the Hon'ble Supreme Court observed that there is, however, a

conspicuous absence of any clear allegation and/or material suggesting that functions and responsibilities of both the categories of lecturers are similar. ... What is more important and crucial is whether they discharge similar duties, functions and responsibilities. .... We do not find any clear material to show that the duties, functions and responsibilities of both the categories of lecturers are identical or similar. Thereafter para 13 on page 547 the Court observed that the respondents (original petitioners) have failed to establish that their duties, responsibilities and functions are similar to those of the non-technical lecturers in Technical Colleges. .... It must be remembered that since the plea of equal pay for equal work has to be examined with reference to Article 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be. This burden the original petitioners have failed to discharged.

(2) In the case of Sita Devi and others Vs. State of Haryana and others reported in (1996) 10 SCC 1 - relevant paras 3 to 5. As regards Article 14 is concerned, the Hon'ble Court held that it is for the petitioner to satisfy the court that the distinction made is irrational and baseless and that it really amounts to unlawful discrimination. Thereafter in para 5 the Hon'ble Court observed that no attempt has been made in the writ petition to allege and establish that their qualifications, duties and functions are similar to those of squad teachers.

(3) In the case of Union Territory, Chandigarh Vs. Krishna Bhandari reported in (1996) 11 SCC 348 - relevant para 9 on page 252 the Hon'ble Supreme Court has held that it was for the respondent (that case) to produce the necessary material to show that the qualification prescribed for the two posts is the same on his part. He has not produced any material in this regard.

(4) In the case of Union of India and another Vs. S.K.Sareen reported in (1998) 1 SCC 177 - relevant paras 7 & 8. As regards Article 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be.

(5) In the case of Union of India and others Vs. Ram Gopal Agarwal and others reported in (1998) 2 SCC 589 relevant para 9 on page 594. As regards equal pay for equal work, the nature of work, the sphere of work, duration of work and other special circumstances, if any,

attached to the performance of the duties have also to be taken into consideration. For arriving at the said conclusion, the facts of each case have to be scrutinised with precision.

(6) In the case of Union of India and others Vs. Pradip Kumar Dey reported in (2000) 8 SCC 580 relevant para 8 on page 584 the Hon'ble Supreme Court has held that in the absence of material relating to other comparable employees as to the qualifications, method of recruitment, degree of skill, experience involved in performance of job, training required, responsibilities undertaken and other facilities in addition to pay scales, the learned Single Judge was right when he stated in the order that in the absence of such material it was not possible to grant relief to the respondent. Para 9 the Supreme Court has considered this principle.

(7) In the case of State Bank of India and another Vs. M.R. Ganges Babu and others reported in (2002) 4 SCC 556 - relevant para 16 to 18.

(8) In the case of State of Haryana and another Vs. Haryana Civil Secretariat Personal Staff Association reported in (2002) 6 SCC 72 relevant para 9 on page 78 Hon'ble Supreme Court held that regarding equation of posts and equation of salaries of Government employees, the employer's capacity to pay also to be considered. No attempt is made by the High Court to compare the nature of duties and responsibilities of the two sections of employees.

(9) In the case of Food Corporation of India Workers Union Vs. Food Corporation of India and another reported in AIR 2002 SC 1659 - relevant para 4 on page 1661.

(10) In the case of Orissa University of Agriculture and Technology and another Vs. Manoj K.Mohanty reported in (2003) 5 SCC 188 - para 10, 12 and 14. The Hon'ble Court has held that court has to examine the pleadings and the facts of the case in order to appreciate whether the respondent satisfied the relevant requirements such as the nature of work done by him as compared to the nature of work done by the regularly appointed Junior Assistants. In para 14 the Hon'ble Court has further held in para 14 that in the absence of necessary averments and materials placed on record, there was no scope to give directions as is done by the High Court in the impugned order.

(11) In the case of State of Orissa and others Vs.

Balaram Sahu and others reported in AIR 2003 SC 33 relevant para 11 on page 37 the Hon'ble Court observed that equal pay would depend upon not only the nature of the volume of the work, but also on the qualitative difference as regards reliability and responsibility as well and though the functions may be the same, but the responsibilities do make a real and substantial difference. Thereafter in para 13 on page 38 the Hon'ble Court further observed that to claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on par with the other group vis-a-vis an alleged discrimination.

(12) In the case of State of Haryana and another Vs. Tilak Raj and others reported in AIR 2003 SC 2658 relevant paras 12 and 13 on page 2661.

(13) In the case of Government of West Bengal Vs. Tarun K.Roy reported in (2004) 1 SCC 347 particularly paras 20 to 25 on page 356, Article 14 and burden of proof is considered.

(14) In the case of Joshi Tushar Tansukhbhai and others Vs. State of Gujarat reported in (2004) 1 GLH 656 relevant paras 24, 30, 31 on page 667 and also paras 36 to 47.

10.9 The petitioners who are Border Wing Home Guards are governed by the Bombay Home Guards Act, 1947, and the Bombay Home Guard Rules, 1953 and are entitled to whatever is given to them under the Act and the Rules and the petitioners cannot claim any relief or benefit which goes beyond the statutory framework of the Bombay Home Guards Act, 1947 and the Rules. The petitioners have not made out any case whatsoever giving full details of each petitioner.

10.9A The burden of proving the case for equal treatment lies upon the petitioners and the petitioners have failed in discharging this duty by giving details of the points of comparison with other person they project.

10.9B The learned advocate further submitted that the petitioners have asked for pay and allowance which ordinarily permanent employees gets in this behalf. The learned counsel further submitted that the nature and work done by the petitioners and other employees are different and, therefore, on the principle of equal pay and equal work, the petitioners are not entitled to the

same.

10.9C The learned counsel further submitted that there has never been a fixed policy or practice of not permitting:

(a) Disembodiment of more than 20 members of each company at a time.

(b) The period of disembodiment being exceeded 15 days in one quarter of the year.

10.10 The learned counsel further submitted that for substantiating the averment in respect of the alleged policy/practice of the aforesaid nature, the petitioners rely upon various internal office correspondence produced at Annexure "N" at pages 370 to 376. The letter addressed by Battalion Commandant to Company Commander dated 3rd June, 1998(page 370), letter dated 4th July, 1998, addressed by Battalion Commandant, Kutch-Bhuj to Company Commander (page 372), letter dated 28th December, 1998, addressed by Battalion Commandant to Company Commander (page 375), and the another letter dated 18th December, 2001, addressed by Director General of Police, Kutch-Bhuj to Commandant, Border Wing Home Guards, Battalion No.1, Palanpur, Battalion No.2 Bhuj and Battalion No.3 Jamnagar.

10.11 The learned counsel submitted that the contents of the said correspondence merely suggest that a particular decision was taken at the material time keeping in mind the prevailing administrative contingency and exigency and none of the said correspondence can ever be said to have laid down any policy. Learned counsel further submitted that the said correspondence on the contrary suggests that disembodiment should be at least for the period of 15 days and does not suggest that the period of disembodiment cannot exceed 15 days in any period of 3 months of the year. Learned counsel further submitted that assuming without admitting that such was the policy decision, a policy decision can always be changed as per the administrative contingencies and exigencies.

Termination/Disembodiment:

10.12 The learned counsel further submitted that in context of the facts of the present case, the terms 'termination' and 'disembodiment' are distinct and different. When members of the Border Wing Home Guards are disembodied, no termination takes place and the

following aspects of their service conditions are protected.

(a) Their names continue on their respective Company/Battalion Rolls.

(b) Their ranks, service conditions and seniority at the time of disembodiment are protected and as and when they are disembodied, they retain their rank, service conditions and seniority.

(c) They are given honorarium at prescribed rate as per their rank while disembodied.

(d) They are free to pursue any vocation, trade or business while they are disembodied.

10.13 The learned counsel submitted that the aforesaid aspects make it abundantly clear that the services of Border Wing Home Guards is of voluntary nature and totally need-based. It is pertinent to note that as and when there are requisitioned by the police force requiring the services of Border Wing Home Guards, the said members are provided to the police force and as and when the requirement is over, they are sent back to their respective Head Quarters.

10.14 The learned counsel further submitted that coming to the aspect of 'termination' the service of the concerned person is put an end to, and there is neither any protection provided to such person nor his name continued on the rolls after the termination.

10.15 In support of the aforesaid proposition, the learned counsel has relied upon the following authorities:

(1) In the case of Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others reported in AIR 1994 SC 1638 particularly para 4 the Hon'ble Court has held that "it is difficult to envisage for them, the status of workmen on the analogy of the provisions of Industrial Disputes Act, 1947, importing the incidents of completion of 240 days' work. The completion of 240 days' work does not, under that law import the right to regularisation.

(2) In the case of Gram Sevak Prashikshan Kendra Vs. Workmen Employed Under Them Represented By the Manjri Farm Kamgar Union and others reported in 2001 SCC (L&S) 1189, particularly para 3 on page 1190 the Hon'ble Court held that by virtue of continuing for 240 days and more,

they do not acquire a permanent status to be absorbed as regular employees.

Distinguishing Features of the West Bengal's case and the present case are as under:

10.16 The learned counsel further submitted that merely because in some of the years the petitioners are required to work comparatively for larger number of days in a year, it cannot be contended that they deserve to be regularised. Such emergent situation do not necessarily arise every time and the concept of completion of 240 days' work does not import the right to regularisation. For that he has relied upon the affidavit filed by one Major Yashoraj Sinh Gohil, Battalion Commandant dated 4th November, 2003, where a table has been annexed showing the year, specification of the emergent situation and requisition from Central/State Government for the year 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002 and 2003. From the said table, it was submitted that the petitioners were required to work comparatively for larger number of days in a year, it cannot be contended that the nature of work performed by them is perennial. Such emergent situations do not necessarily arise every time and, that therefore, declaring the petitioners as permanent and full-time members of the Border Wing Home Guards only on this ground, for all time to come, will entail huge monetary burden either on the part of the State Government or the Central Government, because it is not only the State Government which requires their services, but the Central Government also requires their services. Thus, it is by the very nature of their appointment as Home Guards, the petitioners are liable to be embodied when the requirement arise and liable to be disembodied when there is no requirement. It is under these circumstances, that on embodiment as well as during the period of training, they are receiving honorarium equivalent to the prescribed pay and allowances at the minimum scale appropriate to their ranks and trades in the State Armed Police Force.

10.16A It was also stated in the said affidavit that the members of a voluntary organization of Home Guards cannot be compared with the members of State Armed Police in terms of: (i) the actual nature of duty, (ii) nature of permanent employment, and (iii) spread over of the employment and duty period etc. though for the purpose of giving pay and allowances at the minimum scale, a deemed comparison is drawn with their appropriate ranks and trades in the State Armed Force. It was also stated

that the petitioners are being embodied i.e. called for duty as per the exigencies either at the behest of the State Government or of the Central Government. On pages 226 to 229 the deponent has shown year, specification of the emergent situation and requisition from Central/State Government from time to time.

10.17 Non-Applicabilities of Judgment of Hon'ble Apex Court in case of State of West Bengal Vs. Pantha Chatterjee (supra):

(i) The nature of duties of the petitioners. i.e. the part-time Border Wing Home Guards is not in any way comparable with the nature of duties being performed by the Regular Border Wing Home Guards.

(ii) The petitioners are members of the Home Guards Organisation which is an auxiliary force generally acting in aid of and assisting the police force.

(iii) All the time they have been required to work at various places like Kandla, Bhuj, Mandvi, Porbandar, Bhavnagar, Jamnagar, Rajkot, Ahmedabad, Gandhinagar, Anand, Surat etc. It is hardly for a few days during the period from 1986 to 1992 that some of the petitioners were posted in the out-post area of Khavda or Lakhpat etc. which is away from the actual International Border.

(iv) None of the members thereof including the petitioners herein are physically stationed on the International Border. The petitioners are disembodied from time to time and are free to pursue their avocations during the course of their disembodiment and are only called out for duty only in case of need. All the petitioners have their respective avocations and many of them are engaged in agricultural activities and that therefore during the course of their disembodiment, they go back to their respective work places.

(v) The petitioners have neither put in 14 years' service nor are they patrolling the border, much less in all weathers without any facilities.

(vi) The petitioners during embodiment as well as during the period of training are receiving honorarium equivalent to the prescribed pay and allowances at the minimum of the scale appropriate to their rank and trade in the State Armed Police Force.

(vii) It was submitted that all these features are

subject features which are not present in the West Bengal's case (supra) before the Hon'ble Supreme Court and, therefore, the said decision is not applicable to the present facts and circumstances of the case.

10.18 The learned counsel further submitted that the petitioners have heavily relied upon the judgment of State of West Bengal Vs. Pantha Chatterjee and others (supra), the facts in the aforesaid case are different from those obtaining in the present case.

11. In view of the same, the aforesaid judgment cannot be treated to be a precedent for the present matter and the same cannot be read like a statute. For that purpose, the learned counsel has relied upon the following decisions:

(i) State of Punjab Vs. Baldev Singh reported in (1999) 6 SCC 172, particularly paras 43 and 44 on page 204 and 205, a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a decision of the court takes its color from the questions involved in the case in which it was rendered.

(ii) In the case of P.G.I. of M.E. and Research, Chandigarh Vs. Raj Kumar reported in AIR 2001 SC 479, particularly para 11, the Hon'ble Court held that it is, therefore, obvious that the said decision which centered round its own facts cannot be a precedent in the present case which is based on its own facts. We also record our concurrence with the observations made therein.

(iii) In the case of Union of India Vs. Chajju Ram (Dead) By LRS. and others reported in (2003) 5 SCC 568, particularly para 23 on page 576 the Hon'ble Court has held that "a decision is an authority for what it decides and not what can logically be deduced therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion."

12. REJOINDER OF MR. GIRISH PATEL, LD. SR. ADVOCATE FOR THE PETITIONERS.

12.1 The learned counsel for the petitioners has submitted that several contentions have been raised by the respondents in their affidavit in reply as well as written submissions made by them and also oral submissions made by the learned counsel for the

respondents at the time of hearing. He submitted that while arguing the main petition some of the reply to the said contentions has already been dealt with. However, for some of the contentions of the respondents, he would like to reply in the rejoinder as under:

12.2 As regards contentions of the petitioners about the disputed questions of fact and provisions and rules and the Government Scheme and the petitioners having prima facie case, the learned counsel for the petitioners has already dealt with the point while arguing the main matter and therefore he is not repeating the same. The same may be considered as part of his argument.

BURDEN OF PROOF:

12.3 The contention of the respondents is that the petitioners have not discharged the burden of proving their case. In response to that contention, the points mentioned in para (A) clearly go to show that the petitioners have made out a very strong case on the basis of Articles 14, 16 and 21 of the Constitution of India. The petitioners have been able to discharge the burden of proof that the petitioners have been appointed as Border Wing Home Guards under the Government of India's Scheme. That they have been paid as under the scheme and they have continued to work all-round the year on full-time basis for more than 10 to 18 years without any disembodiment except discharge for few days to do domestic works. Thus, the petitioners have discharged their burden of proof.

12.4 Now the burden of proof is shifted to the respondents to disprove the petitioners' case by pointing out the records of the case. It was their duty to disprove the petitioners' facts and they could have easily done so because of the records and data regarding the petitioners are with them but except denying the facts of the petitioners and by making general averments based only on the theoretical aspects of the Scheme and the Act. They have not done anything else and thus they have failed in discharging their duty to disprove the petitioners' facts and secondly in writ petition under Art.226 of the Constitution of India involving questions of fundamental rights, if the facts are to be asserted from the record of both the sides, the final decision is not made to depend upon the technical plea of burden of proof.

DISPUTED QUESTIONS OF FACTS:

12.5 The third contention of the respondents was that the petition involved highly disputed questions of facts, and therefore, this Court should not entertain the petition and drive the petitioners to the civil court and/or any other appropriate forum. The petitioners' reply is as under:

12.5A This is a very strange case where the respondents are trying to convert facts of their own records as disputed facts and then to try to defeat the legitimate claims of the petitioners -

12.6 The petition does not involve any substantial disputed questions of facts because of the facts of the petitioners, viz. their designation, their recruitment, the date of recruitment, the date of training, the number of presence each year, the payment are all from the records, correspondence and affidavits of the respondents which are on record. The respondents are really making frantic efforts to wriggle out of their records by pointing here and there some isolated facts of one or the other case, and therefore, their defence rejoinders are full of contradictions. First they say that the petitioners were never engaged on border duties and then they say that they might have been engaged on border duties for sometimes, on some occasions. Similarly, the border duties have been described by the Scheme and the petitioners are to be recruited from the border areas and now they are trying to show that border means actual line of international border and not the neighbouring areas of 5 to 10 to 15 k.ms. from the border as if the border duties are actually confined to the actual line of the international border. Similarly, when the petitioners pointed out the continuous embodiment from their records, the respondents tried to wriggle out by saying the company might be embodied but the individual guardsmen might be disembodied and even this is also not correct which is from their records. Their own records show and particularly their Scheme that during embodiment and on training, the petitioners are to be given pay scales appropriate to the corresponding ranks and rolls in the State Armed Police and thus the Scheme itself equates the petitioners with State Armed Police with different grades and yet they say with whom the petitioners can be compared. Thus, even when there are no disputed questions of facts, the respondents continue to harp on one thing about disputed questions and such disputed questions of facts are nothing but spurious and artificial.

12.7 It is the contention of the petitioners that all the facts are taken from the respondents records and affidavits and they are not disputed questions of facts but even for the sake of argument if it is assumed without conceding that there are some disputed questions of facts, that alone does not preclude this Court from exercising its jurisdiction under Art.226 of the Constitution of India because the policy of not entering into the disputed questions of facts is only by way of auto-limitation and not by way of constitutional prohibition. If on the basis of the pleadings of the parties with affidavits, this Court can decide the questions, this Court is not precluded from deciding and even this Court can take evidence if necessary.

12.8 Learned counsel for the respondent first relied upon the judgment of the Apex Court in the case of Century Spinning & Manufacturing Co.Ltd and another Vs. The Ulhasnagar Municipal Council and another reported in AIR 1971 SC 1021 particularly para 13 on page 1025 where the Apex Court has held that merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

12.9 The second judgment relied upon is the judgment of the Hon'ble Supreme Court in the case of Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and others reported in AIR 1974 SC 2105 particularly paras 9 and 10.

12.10 The learned counsel also relied upon another judgment of the Hon'ble Supreme Court in the case of Abl International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others reported in (2004) 3 SCC 553 particularly para 16 on page 567, para 19 on page 568 and para 27 on page 572 the court has laid down the principle and ultimately in para 53 on page 580 the court observed as under:

"para 19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur V. Municipal Committee, Bhatinda (reported in (1969) 3 SCC 769) this Court even went to the extent of holding that in a writ

petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

"para 27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

"para.53 From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution.

.... We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when the Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner."

PETITIONERS' CASE CANNOT GO BEYOND STATUTE FRAMED:

13.1 The contention of the respondents is that the

Border Wing Home Guards are constituted under the Bombay Home Guards Act, 1947 and the Rules which is a statutory law and this Court should not go beyond or contrary to the statutory framework. The petitioners' answer is two fold: (i) By giving equal treatment to the petitioners with full-time Border Wing Home Guards is not contrary to anything in the Act or the Rules and does not amount to going beyond the statutory framework. If the Scheme envisages full-time Border Wing Home Guards, the part-time Home Guards only demand that they are like full-time Home Guards and, therefore, they must be treated like that. This does not mean that the petitioners are asking to go beyond the Act because the Bombay Home Guards Act, 1947 and the Rules do not deal with this aspect at all and secondly much more important is that the same statutory framework was there in the West Bengal case where the West Bengal Home Guards Act was involved along with the Government of India's Scheme and it was the defence of the Government there that the Border Wing Home Guards are merely volunteers under the West Bengal Home Guards Act and they cannot ask beyond that but on the basis of the facts of the case, the Calcutta High Court both single as well as the Division Bench directed to treat the part-time Border Wing Home Guards as equal to the full-time staff and granted all benefits and that is what the Supreme Court confirmed. In the present case also, the petitioners are demanding only the same thing. As the petitioners have pointed out that the facts are similar, so if the Calcutta High Court can do and obliterate the voluntary character, this Court can and the Supreme Court in West Bengal case has done it.

13.2 In the face of peculiar facts of the present case which are identical to the fats of the West Bengal case, to insist only upon the statutory framework and to harp upon one thing only viz. voluntary nature of work is nothing but indulging in legal and technical acromatics.

13.3 The contention of the respondents is that the Border Wing Home Guards like the petitioners are just like ordinary rural/urban Home Guards appointed under the Bombay Home Guards Act, 1947. In response to their contention, the petitioners' contention is that though formally the petitioners Border Wing Home Guards are appointed under the Bombay Home Guards Act, 1947 and the Rules, they are really specially constituted as a special wing of the Border Wing Home Guards under the Government of India's Scheme for border States discharging special border duties. The Scheme governed everything and not the Act - Every aspect of the wing as prescribed by the

Government of India's Scheme. If the Border Wing Home Guards were exactly similar to the rural/urban Home Guards for which the Act makes various provisions regarding uniform, training, etc., it would have been necessary for the Government of India's Scheme to make specific provisions regarding each aspect. The Scheme itself shows how the Border Wing Home Guards are qualitatively different from the ordinary rural/urban Home Guards and for showing this qualitative difference, the petitioners referred to the various aspects about the petitioner Border Wing Home Guards. There various aspects have been enumerated above and after reading all these various aspects like the origin of the Border Wing Home Guards, their recruitment from border areas, their training, their uniforms, their descriptions, their payment, the cumulative effect which emerges is that the Border Wing Home Guards like the petitioners constitute a completely special and distinct wing of the Home Guards not to be compared with the normal rural/urban Home Guards.

REGARDING WEST BENGAL'S CASE:

14.1 The respondents have tried to distinguish the West Bengal case from the present case by struggling to point out some so-called different aspects but this contention is totally misconceived and baseless.

14.2 Firstly, the petitioners' contention is that the present case is almost identical in all factual aspects and in terms of law with the West Bengal's case and, therefore, it is merely a question of application of the judgment of the West Bengal case to the present petitioners. It is not a case where the judgment of the Supreme Court in its ratio decidendi to another case dissimilar to similar in some facts. Secondly, the facts of the present case are completely identical with the facts of the West Bengal case. Both the cases involve the same Scheme, viz, the Government of India's Scheme for border States. In both the cases, the Border Wing Home Guards are to be constituted and governed by the same thing. In both the cases, the form which is to be used is the State Home Guards Act. In both the cases, they are described as part-time Border Wing Home Guards. In both the cases, the duties are the border duties as determined by the Scheme. In both the cases, they have been working continuously all-round the year for long period as 14 years in West Bengal case and 10 to 18 years in the present petitioners' case. In both the cases for various reasons, the petitioners have been engaged and

were not in a position to go back for their domestic occupation. In both the cases, the Scheme envisages full-time staff and part-time and the relief claimed and given in West Bengal case is that the part-time Home Guards are to be given the same treatment as full-time staff and that is what the petitioners are demanding in the present case. The petitioners have brought out the identical features of the two cases on page 209 onwards.

14.3 The respondents tried to point out that in the West Bengal case, the West Bengal Government has admitted the facts but the Central Government disputed the claim while in the present case, the State Government and the Central Government do not admit the case. This is a hardly a difference. In the West Bengal case, the Government of West Bengal while taking benefit of the duties of the Border Wing Home Guards was frank and honest only to admit the facts of the case and do justice while in the present case, the Government is not honest in accepting the facts of their own records and defuses to accept the liability. There is no difference between the two cases. In West Bengal case, the facts and continuous engagement was admitted by the State Government. In the present case, the facts of continuous embodiment or engagement emerges from the records of the Government itself, and therefore, this fact cannot be used by the respondents to distinguish the two cases. Moreover, in the present case, the Central Government put forward the same defence as the Central Government in the West Bengal case and the Supreme Court condemned the approach of the Central Government as unfair and unreasonable. The Central Government cannot escape from the liability because of their own failure to supervise and monitor the implementation of the Scheme.

ALL DETAIL OF FACTS GIVEN:

14.3A The respondents' consistent endeavour was to show that the petitioners have not given their details and this Court cannot investigate into these various aspects. The petitioners' answer is as under:

14.4 The petitioners have pointed out that they have given all the details about each of the petitioners and they have made out a very good case pointing out their main grievances. Two opportunities were given to the respondents to deal with the petitioners' grievances after proper instigation.

(i) When the earlier petition - Special Civil Application No.9113/2001 and other related

petitions were filed, this Court after issuing notice and granting interim relief passed the final order dated 28.1.2003 to the effect that the petitioners shall make representation to the respondents regarding their grievances and the respondents will consider the representation and take decision. Till then, the status-quo was to be maintained. The respondents in response to the petitioners' representation only came out with a formal decision that the benefits claimed by the petitioners cannot be granted. The decision on the representation did not deal with any of the averments made by the petitioners.

(ii) In the present petition - Special Civil Application No.10862/2003, Hon'ble Mr.Justice K.S.Jhaveri passed an order dated 22.7.2004 directing the State Government to form a High Level Committee consisting of top Secretaries and Officers both of the State Government and the Central Government and will consider the grievances of the petitioners regarding and take a decision within a certain time and submit the decision to the Court. Accordingly, a High Level Committee was constituted by the Government of Gujarat including the tope officers of the organisation and the officers from the Central Government and took about 2 months and yet came out with a report and gave the report along with the affidavit on 20.10.2004. In spite of the direction of the Court to consider the petitioners' grievances and in spite of the time taken, the Committee did not consider the grievances of the petitioners but only dealt with the formal structure of the Home Guards and decided that the benefits claimed cannot be given. The Committee did not care to know and understand the case of the petitioners and their grievances based upon the facts of the case but simply looked at the Bombay Home Guards Act, 1947 and the Rules and gave the decision. This was the great opportunity given to the respondents to deal with the specific grievances of the petitioners on the basis of the specific facts of the case, the Committee should have asked the petitioners or their representatives to present their case. The Committee also did have before it the entire proceedings of the present petition including all affidavits, replies and rejoinders. The Committee also did have the Supreme Court judgment in West Bengal case and yet the High

Power Committee did not care to consider any of these things. The Committee did not deal with any of the specific averments of the petitioners regarding their engagement, continuance of duties, the benefits given or denied, the duties they have performed, etc. The Committee even did not care to refer to the judgment of the Supreme Court in West Bengal case, if any. As a result thereof, the report is only formal and technical and by way of performing a ceremony and missed the opportunity. The Committee could have brought out the facts of the case from their side regarding each petitioner or even cross sections of the petitioners and could have either confirmed the averments of the petitioners or could have disproved them. The Committee could also have examined whether the petitioners can be compared with the full-time staff or not after comparing the duties and nature of work and the services rendered. The Committee could also have gone into the question of corresponding ranks in the State Armed Police with which the petitioners have been equated. The Committee could also have examined whether the petitioners have actually worked for all these days or not because the data were with them, but the Committee did not do any of these things. The order of this Court was to see that the legitimate grievances of the petitioners are resolved amicably so that both the parties may not be required to go on litigations after litigations. The Court also wished that instead of this Court deciding the grievances of the petitioners, the High Power Committee consisting of top officers of the State Government, the Central Government and the organisation should itself go into the questions. The Committee failed to do this and now the respondents clamour that where are the facts and all facts are disputed and the Court cannot decide it. The Court wanted the Committee to decide this with all the facts available to them but the Committee did not do it, and therefore, only objective of the respondents' defence was to drive away the petitioners from the constitutional remedy of approaching this Court under Art.226 of the Constitution of India and to compel them to go to any other forum. This is really unbecoming of a model employer which the State in India under the Constitution is expected to be and is enjoined to be.

REGARDING REGULARISATION:

14.5 The respondents have miserably failed to understand the case of the petitioners. The petitioners' case is not a case for regularisation of irregularly appointed persons as the petitioners are regularly appointed persons in accordance with the established procedure and after giving opportunities to all and after having fulfilled all the qualifications and standards necessary. The petitioners' case is also not a case of converting ad-hoc or casual workers into regular workers. The petitioners' case is not a case of comparing one group with altogether different group if some facts are similar.

14.6 The petitioners' case and their prayer is that though the petitioners have been described as part-time Border Wing Home Guards, they have been working in fact on full-time basis throughout the year and for last more than 10 to 18 years. The petitioners are not part-time in a normal sense of the term "part-time employees." The petitioners have not been working for few hours a day or for 2 or 3 days in a week like part-time Lecturers in Law Colleges. The petitioners have tried to show that whenever they are working on full-time basis, i.e. 8 full hours like the full-time staff and particularly to remain in the campus for 24 hours because the nature of the duties on the border areas is different. In this sense of the term, the use of the word "part-time" is a misnomer.

14.7 Just as the petitioners are working on full-time basis, they have also shown that they have been working round the year for the last 10 to 18 years and particularly have shown from their records that the petitioners have worked for more than 300 days for more than 10 years and 365 days for at least 5 years. Thus, the petitioners have shown their de facto position and in fact they have been working on a full-time basis throughout the years or several years like the full-time staff of the Border Wing Home Guards and the petitioners' only prayer is that their de facto position of full-time work must be treated as de jure position of full-time staff.

15. In this set of facts, the various judgments cited by the respondents regarding equal pay for equal work are totally misconceived and are not applicable at all.

EQUAL TREATMENT:

15.1 The respondents have continued to ask with whom

are petitioners comparing for claiming equal treatment. The petitioners' simple answer is that the answer to the respondents' case is given by the respondents themselves, viz, the petitioners have been equated in respect to the pay scale during embodiment and on training with corresponding ranks and rolls in the State Armed Police and the petitioners are paid the minimum pay scales accordingly plus dearness allowance. Thus, the petitioners have been compared in their various grades and designations with various designations in State Armed Police. The comparison is given by the respondents themselves.

15.2 Similarly, the full-time staff of the Border Wing Home Guards is to be paid as per the State Armed Police. The petitioners' contention is that if the full-time is treated at par with the State Armed Police and if the petitioners are working as full-time staff and are given the pay scales appropriate to the State Armed Police, the petitioners must be given the same treatment as the full-time staff in respect of pay and other benefits, nothing more, nothing less.

15.3 The learned advocate for the petitioners has relied on an article reported in Harvard Law Today which is published on June 9, 2004 by Professor Bill Stuntz. The relevant portion of the said article is reproduced hereunder:

"Actually, you will be shocked to hear that I have a serious point to make. We are all too tempted, both in law school and in law practice, to treat law as a mind game - all brain and no heart. I move my pawn, and you move your bishop. I take your knight, you snatch my rook. But the kinghts and bishops and rooks, and most of all pawns, are people whose fortunes and whose very lives are in the hands of their lawyers. If we are going to do law right, we need to look at those lives. We need to stare at them. What is needed is not just the assimilation of information, or the assertion of the proper legal claims, but empathy, humanity.

We all want a humane legal system, but I think we sometimes forget that the largest part of humane is human. A humane legal system would look at the people it deals with as human beings, people with hearts and heads and lives and troubles. I think the biggest problem with our legal system is that much too often it sees the

people it deals with as disembodied crimes or torts or bank accounts, and not as human beings. If we are ever to fix that, if we are ever to get that right, we need lawyers with great minds, but we also need lawyers with great hearts."

CONTENTION ON BEHALF OF UNION OF INDIA - RESPONDENT NO. 3

15.4 Mr. Malkan, learned senior Standing Counsel, has appeared on behalf of the Central Government. He has invited my attention to the affidavit in reply filed by the Central Government. In fact, he has adopted the argument of Mr. Kamal Trivedi, learned Additional Advocate General. He has also stated that the petitioners are not entitled to any relief as prayed for by them. The affidavit is filed by one Pratapsingh, Assistant Director General DGCD. He has stated that the functions of the petitioners are auxiliaries to the Border Security Force. The central role of the Border Wing Home Guards is not to function as a supportive force for the Defence Forces. It was stated that the enrolment as Home Guards is neither an employment nor a mean of livelihood and they continue to follow their own occupations/employment. Border Wing Home Guards are normally enrolled from within a belt of 50 kilometers from the borderline in the concerned districts and are called to perform specific jobs, when required within that district. He has admitted that the Central Government's liability for the scheme is 70%. He has further stated that no comparison can be made between volunteers and public servants. Since the volunteers do not fall in the category of labour, the contention of unfair labour practices being adopted against them are therefore non-acceptable.

CONCLUSIONS AND DIRECTIONS:

DISPUTED QUESTION OF FACT:

16. Before I deal with the contention of the petitioners, the respondents have contended that the petition requires to be rejected on the ground that the petition raises disputed question of facts. I will first dispose of the said contention of the respondents before I decide the merits of the matter.

17 The respondents have broadly contended that the petition raises highly disputed questions of fact and this Court under Article 226 of the Constitution of India would not enter into the disputed questions of fact and

the petitioners have to go to Civil Court or any other appropriate forum if they want.

18 As regards previous records of the case, I have already stated in paras 6, 6.1, 6.2 and 6.3 of the judgement. It may be noted that earlier petition No. 9113 of 2001 was filed and in that case an opportunity was given to the petitioners to withdraw the petition and make representation. The petitioners made representation dated 31.3.2003 but the respondents rejected the same on 22.9.2003 (see page 121). The respondents have not considered the basic contentions raised by the petitioners.

19. It may be noted that during the course of hearing of the present matter, this Court passed order dated 22.7.2004 for constitution of a Committee and the petitioners are entitled to make representation before the said Committee. However, the Committee has filed its report dated 9.9.2004. The Committee did not consider the judgement of the Hon'ble Supreme Court in the case of State of W. B. (supra) as well as judgement in the case of Gujarat Agricultural University Vs. Labhu Bechar and others (supra) which has been considered by the learned Single Judge. The Committee also did not address on the merits of the matter. In view of the same, though two attempts were made by this Court to give opportunities to the Government to consider the case of the petitioners, both the attempts have failed. In view of the same, I am not inclined to relegate the petitioners to either Civil Suit or go to Central Administrative Tribunal to consider their case because if I do the same it will be simply a waste of time, energy, money of the petitioners, respondents and also waste of valuable time of this Court.

20. It may be noted that the learned counsel for the petitioners has relied on the judgement of the Hon'ble Supreme Court in the case of ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others (supra) which I have referred to earlier. In view of the principles laid down by the Hon'ble Supreme Court it has been observed by the Hon'ble Supreme Court that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution and in that case the Hon'ble Supreme Court has opined that in such factual situation it should not inhibit the High Court from granting the

relief sought for by the petitioners. When I discuss the other aspect of the matter, in my view there is a clear violation of Article 14 of the Constitution as well as I have considered Article 21 of the Constitution and also judgement of the Hon'ble Apex Court in the case of State of W.B. (supra) and therefore in my view the contention of the respondents that the petition may be rejected solely on the ground that it raises disputed questions of fact cannot be accepted and the same is rejected. The petition is, therefore, maintainable.

21. What are the disputes have been narrated by me while considering the arguments. However, it may be noted that in this case the petitioners have raised only basic facts. Normally they were appointed under the provisions of Bombay Home Guards Act and Rules. The terms and conditions of the petitioner are governed by the scheme issued by the Central Government. These two basic facts are undisputed. They have also narrated the detailed procedure of appointment and also training and the work which they have done. The have also stated that the persons who are selected for Border Wing Home Guards constituted from the areas of the border only and they work near the border. These are the basic facts which have been set out by the petitioners. All other facts have been set out by the respondents in their affidavits in reply which the petitioners have relied on subsequently in the subsequent affidavits which they have filed. What is the independent case of the petitioners I have set out and also set out various facts which show that the petitioners have prima facie a strong case. They have worked since long time. They have worked throughout the year and even the number of days for which they have worked, details have been shown. Same has been shown by me while considering the arguments of Mr. Patel, learned advocate for the petitioners.

22. In a writ petition, theoretically, the High Court has jurisdiction to determine the questions both of fact and law. It is true that usually the High Court is reluctant to go into questions of fact which require oral evidence for their determination. If the oral evidence and other documentary evidence require the parties are relegated to the original civil suit or a Central Administrative Tribunal in this case. However, in this case the petitioners have filed voluminous affidavit. The respondents have also filed various affidavits. Therefore, the facts of the case are in a narrow compass. It does not require any oral evidence or producing any other evidence to establish the facts of the case. Therefore, when enquiry into the questions of fact arises

in a writ petition it is a question of High Court's discretion whether or not it will enter into such such questions; it is not that the Court does not have jurisdiction to do so.

23. Here I am concerned with large number of people who are serving as Border Wing Home Guards and it will not be proper for me to relegate all these persons in ordinary proceedings where more time will be taken and it will be more expensive for the petitioners. In view of the same, I am of the view that the present petition cannot be dismissed only on the ground that it raises a disputed question of fact. In my view, this petition raises mixed question of fact and law and therefore under Article 226 of the Constitution this Court has jurisdiction to decide this petition. I, therefore, reject the contention of the learned counsel for the respondents that this petition should be rejected on the ground that this petition raises a disputed question of fact.

STATE OF W.B. VS. PANTHA CHATTERJEE (supra):

24. The learned counsel for the petitioners has heavily relied on the judgement in the case of State of West Bengal Vs. Pantha Chatterjee (supra). In that case part time Border Wing Home Guards being dissatisfied with the pitiable conditions of service under which they had been working and the nominal emoluments paid to them, approached the Calcutta High Court by filing writ petition under Article 226 of the Constitution of India. Their scheme issued by the Central Government was dated 15.10.1976 along with the State of West Bengal. The said scheme of Border Wing Home Guards consisted of part time Border Wing Home Guards and full time Border Wing Home Guards. In that context, the learned Single Judge of Calcutta High Court referred to the scheme and the letter of West Bengal Government and held in favour of the petitioners after referring to certain judgements . The findings of the learned Single Judge is on page 4 of the said judgement. Thereafter, the matter went to Division Bench and the Division Bench confirmed the view of the learned Single Judge and only set aside with the finding regarding finding in rem. The whole scheme has been discussed by the Hon'ble Supreme Court in paragraphs 6, 7 and 8 of the judgement. In that case also, the Government contended that the Home Guard is a voluntary organisation made on part time basis and their appointment was for only three months. That contention has been negatived in para 9 of the judgement. In para 13 on behalf of Union of India more or less said

contention has been noted by the Union of India namely the petitioners have been members of a voluntary organisation. They were recruited under the State Home Guards Act by the State machinery. Master and servant relationship of the petitioners existed only with the State Government. The Central Government was liable to bear the financial liability provided under the Scheme. In that context, the Hon'ble Supreme Court has observed in para 10 that Border Wing Home Guards were required amongst others for the purposes of patrolling the border as well as with a view to check infiltration from across the border. They have to help and assist and to do patrolling etc. along with and under the supervision and direction of the Border security Force authorities and the Hon'ble Supreme Court noticed that the duties of the permanent Border Wing Home Guards and part time Border Wing Home Guards are the same, and performed under the same situation and circumstances but there has been disparity in their emoluments and other facilities, necessities for performing their duties. In para 11 of the judgement the Hon'ble Supreme Court has considered the entire scheme of the Act, the voluntary nature and also the question of disengagement of certain periods. In para 12 of the judgement on page 479 the Hon'ble Supreme Court held that both part time and full time Border Wing Home Guards are working for the same duration in the same conditions but one of them with and other without the necessities of the job. The Hon'ble Supreme Court negatived the contention of the State Government as well as Solicitor General appearing for Union of India. In paragraph 13 of the judgement the Hon'ble Supreme Court has observed its findings. In para 16 of the judgement the Hon'ble Supreme Court has come to some finding and in para 17 and 19 which I have already quoted earlier the Hon'ble Supreme Court has given certain findings.

24.1 In view of the judgement of the Hon'ble Supreme Court, the following facts of petitioner's case is identical with West Bengal's case (supra).

(a) The petitioners are in deployment since 1985. From 1988 till the current year, all the petitioners herein have been deployed in the service of the respondent authorities for more than 300 days in every year. The same sets of petitioners who were initially deployed in 1985 are still working for more than 15 years now and their duties have never been rotated.

(b) The battalion of Border Wing Home Guards is

raised by the State Government and the petitioners herein are being paid by and from a particular head of expenditure of the State Government.

(c) While on duty on the Kachchh border, the petitioners are under the operational control of the Border Security Force personnel. In fact, the petitioners are required to cooperate with the Border Security Force personnel while guarding /patrolling the border.

(d) The work of guarding / patrolling the border is of a perennial nature. In case of the petitioners, all of them were continued after the first term of appointment of 3 years.

(e) Similar necessity was felt for raising of Border Wing Home Guards battalion in the State of Gujarat so as to check infiltration of foreigners from across the Indo-Pak border.

(f) The strength of the Border Wing Home Guards battalion is sanctioned by the Government of India (see para 14 of the affidavit in reply dated 29.9.2003 filed by respondent No. 2)

(g) Preference was to be given to the Home Guards Organisation already on the rolls for constituting the Border Wing Home Guards battalion but it was to be ensured that such Home Guards were available for duty during emergency both for long and short durations.

(h) The petitioners are deployed mainly for the purpose of guarding/patrolling the Kachchh border. During emergency like the communal riots in Gujarat or during and after the Kargil war when intelligence inputs were regularly received that a large number of terrorists and other anti-national elements were being readied to infiltrate through the Rann and the coastal area of Kachchh District, the petitioners were employed to assist the Border Security Force personnel for containing any infiltration during such times. During Kachchh earthquake, the petitioners had been mobilised to help non-Governmental Organisations and ordinary people in Disaster Management.

(i) The petitioners are mainly deployed for the

purpose of patrolling/guarding the Indo-Pak border or the Kachchh border with a view to check infiltration from across the border.

(j) The duties of the petitioners who are labelled as part time Border Wing Home Guards are exactly identical to those of the permanent (full time) Border Wing Home Guards.

(k) The petitioners have been in deployment of the respondents since 1985. From 1988 to till the current year, the petitioners have average more than 300 days in every year in the employment of the present respondent Nos. 1 and 2. In years like 1989, 1992, 1999, 2000 and 2001, the petitioners were not disembodied for a single day. Thus, the petitioners have been continuously engaged (barring minor artificial breaks of one month or two months at the most) by the present respondent Nos. 1 and 2 for guarding / patrolling the Kachchh border for more than a decade now. The Scheme of disembodiment itself presupposes more or less permanent character of the para-military force called Border Wing Home Guards. The purpose of disembodiment is to merely make a show that the Border Wing Home Guards are not permanent. Thus, the demobilisation or disembodiment of the petitioners are mere artificial breaks in their continuous service. It is not that their services are not required or that they are required to be retrenched.

(l) The petitioners who are labelled as part time Border Wing Home Guards have in reality never been freed by the present respondent Nos. 1 and 2 to allow them to resume their old vocational pursuits.

24.2 It may be noted that in the judgement of the Hon'ble Supreme Court in the case of State of W.B. Vs. Pantha Chatterjee (supra), the Hon'ble Supreme Court was concerned with the provisions of the Home Guards Act under which the petitioners in that case were appointed. The Hon'ble Supreme Court was concerned with the Scheme of Border Wing Home Guards dated 15.10.1976 issued by the Government of India, Ministry of Home Affairs, to the Chief Secretaries to the Governments of Assam, Meghalaya, Tripura and West Bengal for creation of Border Wing Home

Guards for Eastern States. The learned counsel for the petitioner has filed an affidavit dated 17.1.2005 and produced a copy of the said scheme. After perusing the said scheme and also perusing the present scheme of 1979 which is on the record of this case, if one compares both the scheme of 1976 and the scheme of 1979, it appears that both the schemes are identical in all aspects except that for the Eastern States the expenditure on the scheme is to be met by the Government of India at 100% on the authorised staffing pattern whereas in the present case for the State of Gujarat the expenditure on the scheme is to be met by the Government of India at 75% on the authorised staffing pattern. This is one of the additional reasons by which I have accepted the contention of the learned counsel for the petitioners that the judgement of the Hon'ble Supreme Court in the case of State of W.B. Vs. Pantha Chatterjee (supra) squarely applies to the present case.

24.3 The judgement of the Hon'ble Supreme Court in the case of State of West Bengal Vs. Pantha Chatterjee (supra) would squarely apply to the case of the petitioners and therefore the directions which have been given by the Hon'ble Supreme Court in the case of State of West Bengal Vs. Pantha Chatterjee (supra) are applicable to the case of the present petitioners.

25. What is precedent: How the ratio of the Hon'ble Supreme Court to be relied upon.

25.1 It may be noted that the observations made in the case of COMMISSIONER OF INCOME TAX VS. M/S. SUN ENGINEERING WORKS (P) LTD. reported in AIR 1993 SC 43, particularly, paragraph No. 39 on page 57 where the Hon'ble Apex Court has observed that the judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgement, divorced from the context of the question under consideration by this Court, to support their reasonings. The Hon'ble Apex Court has relied on the decision in the case of MADHAV RAO JIWAJI RAO SCINDIA BAHADUR VS. UNION OF INDIA (1971) 3 SCR 9 in support of the said conclusion.

25.2 It may be noted that Full Bench of this Court

(Coram: M.P. Thakkar, C.J., A.M. Ahmadi (as they were then) and R.C. Mankad, JJ) in the case of The Ahmedabad Mfg. & Calico Printing Co. Ltd. Vs. Union of India & Ors. reported in 1983(1) G.L.R. 1 has observed on page 12 as follows:

"What is considered binding to all the Courts is the ratio decidendi of the decision which is to be gathered from the statements of principles of law applicable to the legal problems disclosed by the facts of the case decided by the Supreme Court.

25.3 The Full Bench of this Court thereafter relied on the judgement of the Hon'ble Supreme Court in the case of DALBIR SINGH VS. STATE OF PUNJAB (A.I.R. 1979 SC 1384), MADHAV RAO SCINDIA VS. UNION OF INDIA (AIR 1971 SC 530) and A.D.M. JABALPUR VS. S. SHUKLA (AIR 1976 SC 1207) and after referring to the said judgements the Full Bench has observed as follows: (pages 12 & 13)

"It is, therefore, evident that the decision of the Supreme Court is only an authority for what is actually decides and the observations made in the judgement should be restricted to the context in which they are made after relating the observations to the precise issue before the Court taking care to interpret the observations in the context of the question before the Court even though the same are expressed in broad terms."

25.4 In view of the above the ratio decidendi in State of W.B. Vs. Pantha Chatterjee (supra) is considered and followed in this case.

25.5 Salmond on jurisprudence, twelfth edition, Chapter 5 makes certain observation on theory of precedent (on page 141 onwards). The importance of judicial precedents has always been a distinguishing characteristic of English law. The judgement and ratio decidendi of the Hon'ble Supreme Court is binding. What the judgement decides generally is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. The parties are bound by findings of fact and law necessary for the resolution of issues between them.

25.6 Dias on jurisprudence, third edition, on page 45,

Chapter three provides certain guidelines for precedent. It says that in its broadest sense a precedent is any pattern upon which future conduct may be based. A convenient nomenclature for the common law doctrine is stare decisis, which is derived from stare decisis et non quieta movere and which serves to distinguish it from the broad doctrine of precedent to be found in all developed systems.

25.7 What is important is ratio decidendi of the judgement which has to be followed. The same has been referred by Salmond on jurisprudence, 12th Edition, on page 174, paragraph 29. Similarly Dias on jurisprudence also on page 63 stated what is ratio decidendi. It stated that what is "law" in a precedent is its ruling or ratio decidendi and it is that concerns future litigants as well as those involved in the immediate dispute. The first, which is the translation of it, is the reason for (or of) deciding. Even a finding of fact may in this sense be the ratio decidendi. Secondly, it may mean "the rule of law proffered by the judge as the basis of his decision". Thirdly, it may mean the rule of law which others regard as being of binding authority.

25.8 In view of the aforesaid discussion, the authority cited by the learned counsel for the respondents in connection with the fact that judgement of the Hon'ble Supreme Court in the case of State of W.B. (supra) should not be treated as precedent and the same cannot be read like statute and other judgements in the case of State of Punjab Vs. Baldev Singh (1999) 6 SCC 172, PGI Vs. Raj Kumar (AIR 2001 SC 479), The State Financial Corporation Vs. Jagdamba Oil Mills (AIR 2002 SC 834) and Union of India Vs. Chajju Ram ((2003) 5 SCC 568) will have no application because I have already indicated that the basic facts, namely, the provisions of Home Guards Act and the Scheme issued earlier by the Central Government are common in both the matters. The other facts which are not similar will not have relevance. Therefore, the judgement of the Hon'ble Supreme Court squarely applies in the present case.

25.9 In view of the aforesaid judgement of the Hon'ble Apex Court it may be stated that the question which was raised before the Hon'ble Supreme Court and the decision given by the Hon'ble Supreme Court in which the Hon'ble Supreme Court has considered the decision rendered by the learned Single Judge as well as Division Bench and then confirmed the same. Therefore, the principle laid down in this case has been followed by me in this behalf.

ARTICLE 14: EQUALITY

26. It may be noted that the petitioners contended that the petitioners who are Border Wing Home Guards are different from ordinary Home Guards found to be functioning under the Bombay Home Guards Act, 1947. The petitioners are recruited from within 50 kilometres of the Kachchh border. The Rules of Recruitment require that all persons recruited as Border Wing Home Guards are found to be residing within 50 kilometres of the Kachchh border. There is no such area requirement for recruitment of ordinary Home Guards under the Bombay Home Guards Act, 1947 and the Rules framed thereunder.

26.1 The petitioners are concerned with national security as they are a paramilitary force whereas the ordinary Home Guards are concerned with law and order. It may be noted that during conflict or tension in sensitive areas, the petitioners are deployed for short spells in such areas just as the Army personnel are posted in sensitive areas during high tension.

26.2 During war, the Border Wing Home Guards come under the direct control of the Army. They are actively engaged in providing all kinds of assistance to the Army personnel including collecting information about the enemy.

26.3 Duty of the petitioners on the border outposts is akin to the duty of the Army personnel or Border Security Force personnel stationed on the border. Such duty is continuous and round the clock. The Border Wing Home Guards are not allowed to leave border outposts without the permission of the authorities in command. Disembodiment or demobilisation of the Border Wing Home Guards for very short spells is resorted to so that they are in a position to go back to their respective families for completing their long-neglected domestic work. However, during disembodiment, the Border Wing Home Guards cannot be employed elsewhere. During embodiment, the Border Wing Home Guards are not in a position to take up alternative employment, whereas the Home Guards functioning under the Bombay Home Guards Act, 1947, have alternative employment and are necessarily found to be engaged in other work.

26.4 When on duty on the border, the Border Wing Home Guards are equipped with machine-gun or 303 rifles. The Border Wing Home Guards are called "Jawans" just as the Army personnel are called "Jawans". The word "Jawan" is not used in the case of Home Guards functioning under the

Bombay Home Guards Act, 1947.

26.5 Like the Army personnel, Border Wing Home Guards are given a Regiment number. No such Regiment number is given to Home Guards functioning under the Bombay Home Guards Act.

26.6 Border Wing Home Guards are given Army training. The Home Guards functioning under the Bombay Home Guards Act are given police training.

26.7 Border Wing Home Guards carry a badge which is labelled as "BWHG" whereas Home Guards carry a badge labelled as "HG". The monograph/insignia of Border Wing Home Guards bears the figure of a camel to signify border duty. Whereas the monograph/insignia of the Home Guards functioning under the Bombay Home Guards Act, 1947, bears the figure of lion.

26.8 Like the Army personnel, Border Wing Home Guards are only allowed a maximum period of two months' leave every year. However, when tension escalates on the border and where a great threat to national security is apprehended, the Border Wing Home Guards are not allowed to leave even for two months. It may be noted that the Border Wing Home Guards of Companies B, C, D, E and F have not been disembodied for a single day in seven years from the last 15 years of service. Therefore, the duty is continuous. Border Wing Home Guards are in no sense of the term "volunteers" who can leave their duty at will.

26.9 I have to consider the case of the petitioners with other persons appointed by the respondents. The learned counsel for the petitioners states that both are equally appointed. Therefore, the nature of duties, functioning and characteristics all are same and therefore they cannot be discriminated.

WHAT IS MEANT BY RIGHT TO EQUALITY ARTICLE 14:

26.10 To consider this I will have to examine what is meant by right to equality. In this case I first quote the following paragraph on page 435 in the book on Constitutional Law of India by H.M. Seervai, Fourth Edition, Volume 1.

"Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. We

are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure"

- Abraham Lincoln: Gettysburg address.

26.11 Liberty and equality are words of passion and power. They were the watchwords of the French Revolution; they inspired the unforgettable words of Abraham Lincoln's Gettysburg Address; and the U.S. Congress gave them practical effect in the 13th Amendment, which abolished slavery, and in the 14th Amendment, which provided that "the State shall not deny to any person within its jurisdiction.... the equal protection of the laws." Conscious of this history, our founding fathers not only put Liberty and Equality in the Preamble to our Constitution but gave them practical effect in Art. 17 which abolished "Untouchability" and in Art. 14 which provides that "the State shall not deny to any person equality before the law and the equal protection of the laws in the territory of India." Few Articles of our Constitution were more heavily drawn upon in the early days of our Constitution than Art. 14 and it is not surprising that the decisions of the U.S. Sup. Ct. on "the equal protection of the laws" in the 14th Amendment were freely cited to interpret the same words in Art. 14. However, decisions of our Sup. Ct., and the High Courts soon put the guarantee of equality in its proper perspective."

26.12 The Hon'ble Supreme Court in the case of AJAY HASIA VS. KHALID MUJIB reported in AIR 1981 SC 487 after referring to earlier judgements in the cases of E.P. ROYAPPA VS. STATE OF TAMIL NADU (AIR 1974 SC 555) and MANEKA GANDHI VS. UNION OF INDIA (AIR 1978 SC 597), in paragraph 16 on page 499 has observed as under:

"The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned

legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Art. 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

26.13 The said principle has been reiterated by the Hon'ble Supreme Court in the case of KUMARI SHRILEKHA VIDYARTHI VS. STATE OF U.P. reported in AIR 1991 SC 537. Considering Article 14 in paragraphs 29, 30, 31, 32, 33, 34, the Hon'ble Supreme Court has observed in paragraph 35 on page 554 thus:

"It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Art. 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract."

26.14 In book of K.K. Mathew, Democracy Equality and Freedom, 1978 Edition, on page 227 the learned author has observed as follows:

"Equality, therefore, involves, up to the margin of sufficiency, identity of response to primary needs. And that is what is meant by justice. We are rendering to each man his own by giving him what enables him to be a man. We are, of course, therein protecting the weak and limiting the power of the strong."

26.15 The learned author has on page 230 has further observed as under:

"Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and the necessary social

> services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control. The Directive Principles of our Constitution practically lay down the same principle. As the government's role in providing public housing, unemployment and old age compensation increases, notions of equal protection under the law, not merely in the sense of unbiased laws or unbiased administration of the laws, but in the sense of inalienable rights to minimum living standards, may emerge as they have in the field of education, as crucial in later years. But the suggestion that the State has an affirmative duty to raise everyone to a minimum acceptable standard of living has not assumed the dignity of a constitutional proposition in other countries. The directive principles of our Constitution, though unenforceable, lay down this principle unequivocally."

26.16 In view of the discussion on Article 14 of the Constitution which I have discussed in para 26 factually and thereafter the principle of equality which I have considered from paragraph 26.10 onwards, in my view there is a clear discrimination between the petitioners and the permanent employees of BWHGs on all counts. Part time members of BWHGs would be treated on par with full time BWHGs and they would get all privileges of the State Armed Police as extended to the full time BWHGs.

ARTICLE 21 OF THE CONSTITUTION:

27. Mr. Patel, learned advocate, has also argued that in this case this Court has to consider Article 21 and judgement cited by him. I first consider the "Preamble" of the Constitution of India. The Preamble provides that We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice - social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. Among these the word "justice" is very important. In the book "Preamble - the Spirit and Backbone of the Constitution of India" - Anundoram Barooah Law Lectures, Seventh Series by Hon'ble Mr. Justice R.C. Lahoti, (Hon'ble Chief Justice of India) the learned author has observed what is meant by "justice" thus: (on page 100)

"This means the reconcilement of the individual conduct with the welfare of the society as a whole. The actions of an individual are "just" only if they promote the well being of the society. The aim is to promote the common good rather than only the individual welfare. It does not mean only legal justice as is dispensed by the courts of law. Our Constitution aims at securing "social, economic, and political" justice as well. Hence we have legally enforceable Fundamental Rights and the Directive Principles provide for social and economic justice as well. A large number of the enacting provisions of the Constitution can be read to show the ideal of social and economic justice.

Justice briefly speaking, is the harmonious reconcilement of individual conduct with the general welfare of the society. Every man acts according to his self-interest, but his act or conduct is said to be "just" only if it promotes the general well-being of the community.

The essence of justice is the attainment of the common good as distinguished from the good of individuals or even of the majority of them. Our Constitution professes to secure to all its citizens social, economic and political justice, even though the form of government prescribed by the Constitution is a majority government which lies at the foundation of the representative system.

Ordinarily, the word "justice" indicates legal justice which is available only through the courts which decide disputes between two individuals or between an individual and the State itself, when such dispute assumes the form of a litigation.

In the Preamble, the Constitution speaks of other forms of justice which a welfare State is bound to dispense to the people who made the Constitution."

27.1 The learned counsel for the petitioners submitted that Article 21 of the Constitution which provides right to life and livelihood has been recently interpreted by the Hon'ble Supreme Court in broadway for which he has relied two or three judgements which I have already

referred to in this behalf.

27.2 The petitioners have relied on the judgement of the Hon'ble Supreme Court in the case of FRANCIS CORALIE VS. UNION TERRITORY OF DELHI reported in AIR 1981 SC 746 wherein the scope of Article 21 has been expanded by the Hon'ble Supreme Court of India to hold that right to life includes right to live with human dignity and all that goes along with it namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

27.3 That since Maneka Gandhi's case (AIR 1978 SC 597), article 21 has been given extended meaning.... has been liberally interpreted so as to mean something more than survival and mere existence or in that ... includes all those aspects which can make man life complete and worth living.

27.4 The expanded meaning of Article 21 focuses better quality of life and better right to livelihood. In view of this changed position, this Court must consider the case of Border Wing Home Guards who are working round the clock throughout the year. The details of the same has been given in the petition and also from the affidavits filed by the petitioners.

27.5 It may be noted that Article 21 uses four crucial expressions, viz., "life", "personal liberty", "procedure" and "law". Each of these four expressions has different meaning and connotation.

27.6 M.P. Jain, learned author of Indian Constitutional Law, on page 1271, has explained Article 21 as under:

> "The expression "life" in Art. 21 has been interpreted by the Supreme Court rather liberally and broadly. Over time, the Court has been giving an expansive interpretation to "life". The Court has often quoted the following observation of FIELD, J in "Munn Vs. Illinois (94 U.S. 113) (1877) an American case: "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg."

27.7 It may be noted that right to live with human dignity, so the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilisation which makes life worth living and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned".

27.8 The words "personal liberty" used in Art. 21 has also been given a liberal interpretation. It does not mean merely the liberty of the body i.e. freedom from physical restraint or freedom from confinement within the bounds of a prison. In other words, it means not only freedom from arrest or detention from false imprisonment or wrongful confinement, but means much more than that. The term "personal liberty" is not used in a narrow sense but has been used in Art. 21 as a compendious term to include within it all those variety of rights of a person which go to make up the personal liberty of a man.

27.9 Art. 21 is couched in negative phraseology. But by its creative interpretation of Art. 21 in various cases, the Hon'ble Supreme Court has come to impose positive obligation upon the state to take steps for ensuring to the individual a better enjoyment of his life and dignity e.g. (1) maintenance and improvement of public health; (2) providing humane conditions in prisons and protective homes; (3) improvement of the environment etc. Thus, the quality of life will also have to be important. Even right to life has been extended in this behalf. It may be noted that by creative interpretation, the Hon'ble Supreme Court has taken into consideration certain directive principles of State policy and after considering certain directive principles of State Policy some of the essential fundamental rights include "right to life" and thus right to life has been expanded in this behalf.

27.10 Reading articles 21, 38, 42, 43 and 48A together, the Hon'ble Supreme Court has concluded in the case of CONSUMER EDUCATION & RESEARCH CENTRE VS. UNION OF INDIA (AIR 1995 SC 922) in para 21 on page 938 as under:

"The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the

society in all facets of human activity. The concept of social justice imbeds equality to flavour and enliven practical content of "life". Social justice and equality are complementary to each other so that both should maintain their validity. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results."

27.10A Again in para 26 on page 940 of the said judgement the Hon'ble Supreme Court has observed as follows:

"Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity."

27.11 It may be noted that the Hon'ble Supreme Court of India took giant leaps in protecting and safeguarding right to life in its multifacet, multidimensional and vibrant forms. It includes right to live which includes the right to enjoy pollution free water and air. State is responsible for not taking proper precautions to provide proper drinking water to the citizens. Right to livelihood as protected by Article 21 of the Constitution is only the right to earn such livelihood as is necessary for the sustenance of persons and the deprivation of which would threaten their existence.

27.12 In view of the settled position that expanded the meaning of Article 21 read with Preamble and Directive Policy of the State and the fact that there is already judgement of the Hon'ble Supreme Court which is binding on me, I am of the view that the petitioners have proved a strong case and whatever relief which the petitioners have prayed for, the same should be granted in this behalf. However, I make it clear that this judgement applies to 610 persons only. This judgement will not apply to any other petitioners.

27.13 In view of the same, merely because the petitioners are employed under the provisions of the Bombay Home Guard Act and Rule and they are volunteers that aspect will not go against the petitioners while granting the relief as prayed for in this petition because as regards voluntary character, the Hon'ble Supreme Court has rejected the said contention of the State and the Union of India. The case of the petitioners is that they are covered by the scheme framed by the Union of India. Now the scheme envisaged by the

Hon'ble Supreme Court in the case of State of West Bengal Vs. Pantha Chatterjee (supra) is almost identical to the scheme of the present case. Therefore, whatever interpretation given by the Hon'ble Supreme Court in the case of State of West Bengal (supra) will apply to the present case and to that extent the petitioners are entitled to relief.

27.14 I have also considered the judgement of the Hon'ble Supreme Court in the case of DELHI TRANSPORT CORPN. VS. D.T.C. MAZDOOR CONGRESS reported in AIR 1991 SC 101 particularly the concurring judgement of Hon'ble justice P.B. Sawant and Hon'ble justice K. Ramaswamy particularly in paras 239, 240 and 241. In para 239 of the said judgement the learned Judge has expanded the scope of Article 21 and on page 188 in paragraph 243 of the said judgement the Hon'ble Supreme Court has held as follows:

"Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under rule of law. The prevailing social conditions and actualities of life are to be taken into account to adjudging whether the impugned legislation would subserve the purpose of the society."

27.15 In the case of KARNATAKA STATE PRIVATE COLLEGE STOP-GAP LECTURERS ASSOCIATION VS. STATE OF KARNATAKA AND OTHERS reported in (1992) 2 SCC 29, the principle of equal pay and equal work has been stated by the Hon'ble Supreme Court.

27.16 In GOVERNMENT OF INDIA AND OTHERS VS. COURT LIQUIDATOR'S EMPLOYEES ASSN. AND OTHERS reported in (1999) 8 SCC 560, the Hon'ble Apex Court has considered the parity of service.

27.17 In JAIPAL AND OTHERS VS. STATE OF HARYANA AND OTHERS reported in (1988) 3 SCC 354, the question of equal pay and equal work has been considered. The Hon'ble Supreme Court has considered the question of part time service and full time service in the said case.

27.18 In DHIRENDRA CHAMOLI VS. STATE OF U.P. reported in (1986) 1 SCC 637, particularly para 3 on page 639 the Hon'ble Supreme Court has observed as follows:

"We therefore allow the writ petitions and make

the rule absolute and direct the Central Government to accord to these persons who are employed by the Nehru Yuvak Kendras and who are concededly performing the same duties as Class IV employees, the same salary and conditions of service as are being received by Class IV employees, except regularisation which cannot be done since there are no sanctioned posts."

27.19 In GRIH KALYAN KENDRA WORKERS' UNION VS. UNION OF INDIA AND OTHERS reported in (1991) 1 SCC 619 the Hon'ble Supreme Court has considered parity in employment and equal pay for equal work and also considered Articles 32, 14 and 16 of the Constitution of India.

27.20 In BHAGWAN DASS VS. STATE OF HARYANA reported in AIR 1987 SC 2049 the Hon'ble Supreme Court has considered the question of part time and full time employees.

27.21 I have considered the development of Article 21 and Article 14 and the interpretation/reinterpretation of Articles 21 and 14 by the Hon'ble Supreme Court, particularly, after 1978 decision in the case of MANEKA GANDHI (supra) much water had flowed in the development of Constitutional law. In view of the development of law of Article 21 and 14, I have considered this fact and held that the petitioners whose function, duties, responsibilities are almost identical with other persons who are permanently appointed and therefore the petitioners are to be treated as equal with other permanent persons and the Union of India and the State cannot discriminate them in this behalf. The action of the State Government as well as the Union Government treating the petitioners differently than other permanent employees is absolutely arbitrary and discriminatory and in view of the recent development of law, I am of the view that the action of the Union of India and the State is arbitrary and discriminatory in nature and the action of State and Union of India is bad in law and to that extent writ petition has to be considered.

REGARDING REGULARISATION:

28. The other contention raised by the respondents is that the petitioners did not deserve regularisation has no substance. In this case the petitioners have applied in regular course, they were interviewed, they are selected and thereafter training has been given and thereafter they have been regularly appointed and they have worked in regular working. Therefore, the appointment of the petitioners is not ad hoc, temporary

or any backdoor appointment. The judgements of the Hon'ble Supreme Court which has been cited by the learned counsel are relating to ad hoc, temporary and backdoor appointment and therefore they are applicable to the present case. The learned counsel for the respondent has tried to make distinction that certain persons are temporary and certain persons are permanent. It is no doubt true that the distinction has been made but that is only a label, the nature, work and duties same. Here there is no question of breach of contract. Here the condition of service has been proved by the petitioners. Therefore, the judgement of the Hon'ble Supreme Court in the case of STATE OF BIHAR VS. JAIN PLASTICS AND CHEMICALS LTD. reported in (2002) 1 SCC 216 will not help the respondents. Similarly, in this case there is no question of which institution of minority and therefore the judgement of the Hon'ble Supreme Court in the case of MANAGER, ST. THOMAS U.P. SCHOOL VS. COMMR. & SECY. TO GENERAL EDUCATION DEPTT. reported in (2002) 2 SCC 497. In this case the nature of employment of workmen is not in dispute. The only dispute is whether the petitioners are entitled to relief as prayed for in Article 21 and Directive Principle of State. Therefore the decision in the case of U.P. STATE BRIDGE CORPORATION LTD. VS. U.P. RAJYA SETU NIGAM S. KARAMCHARI SANGH reported in (2004) 4 SCC 268 will not help the respondents.

28.1 In this case I have to see whether functions and responsibilities of both the petitioners and the other persons who are employed permanently by the respondents are same or not. In my view the petitioners as well as the other persons discharging similar duties, functions and responsibilities. There is no difference. Therefore, the judgement in the case of STATE OF MADHYA PRADESH AND ANOTHER VS. PRAMOD BHARTIYA AND OTHERS reported in (1993) 1 SCC 539 will not help the respondents.

28.2 In the present case petitioners have been able to prove that the distinction made by the respondents regarding service condition of the petitioners and other persons who are similarly employed is irrational and it really amounts to unlawful discrimination. Here there is no different qualification, there is no difference of function and responsibility. In this case the qualifications, duties, functions are similar to the other persons who are employed as permanent staff as alleged by the respondents. Therefore, the petitioners are entitled to the relief as prayed for and the judgment in the case of SITA DEVI AND OTHERS VS. STATE OF HARYANA

AND OTHERS reported in (1996) 10 SCC 1 will not help the case of the respondents.

EQUAL PAY FOR EQUAL WORK:

29. The respondents have relied on several judgements on equal pay and equal work. Here in this case I have already narrated that the work done by the Border Wing Home Guards - petitioners and other persons who are permanent, the nature of responsibility, duty and functions are similar and identical and which has been considered by the Hon'ble Supreme Court in similar circumstances where the Hon'ble Supreme Court has granted similar relief and in view of the same the judgements of the Hon'ble Supreme Court in the case of UNION TERRITORY, CHANDIGARH VS. KRISHAN BHANDARI reported (1996) 11 SCC 348; UNION OF INDIA VS. S.K. SAREEN reported in (1998) 1 SCC 177 will not help the respondents.

29.1 In my view the petitioners have very ably proved that their work is equal to the work of other permanent persons and therefore they are entitled to the benefit of equal pay for equal work. They have also demonstrated that the distinction made by the respondents are hostile discrimination between the petitioners and the respondents. The petitioners have filed voluminous affidavits to prove their case and the petitioners have been able to establish their case.

29.2 The petitioners have also shown the nature of work, sphere of work and other special circumstances, if any, have to be taken into consideration and they both are similar in this behalf. In view of the same, the judgement of the Hon'ble Supreme Court in the case of UNION OF INDIA AND OTHERS VS. RAM GOPAL AGARWAL AND OTHERS reported in (1998) 2 SCC 589 will not help the respondents. Similarly, judgement in the case of UNION OF INDIA AND OTHERS VS. PRADIP KUMAR DEY reported in (2000) 8 SCC 580 will not help the respondents.

29.3 In this case the petitioners have produced enough material relating to the fact that the petitioners' qualification, method of recruitment, experience in performance, training undertaken and other facilities are same that of the persons who are employed by the respondents and therefore they are entitled to relief which they have prayed for in this behalf. Similarly, judgement of the Hon'ble Supreme Court in the case of STATE OF HARYANA AND ANOTHER VS. HARYANA CIVIL SECRETARIAT PERSONAL STAFF ASSOCIATION reported in (2002) 6 SCC 72 will not help the respondents.

29.4 I have already considered the affidavit filed by the petitioners and the affidavit-in-reply produced by both the sides and I have also considered the nature of duties and functions and I find that both the petitioners and other persons are performing same duties, functions and responsibilities and therefore the petitioners are entitled to relief. The petitioners have also made necessary averments in the petition though the respondents have denied the same but the denial is simply for the sake of denial but that does not take the petitioners' case away.

29.5 I have also considered that there is no qualitative difference as regards liability and responsibility between the petitioners and other employees who are employed by the respondents, their functions and duties are same and identical. The petitioners have been able to prove that the action of the respondents results into hostile discrimination between the petitioners and other persons who are employed by the respondents and the petitioners are entitled to relief. Therefore, the judgement of the Hon'ble Supreme Court cited by the respondents in the case of STATE OF ORISSA AND OTHERS VS. BALARAM SAHU AND OTHERS reported in AIR 2003 SC 33 will not help the respondents. Similarly, the judgement of the Hon'ble Supreme Court in the case of STATE OF HARYANA AND ANOTHER VS. TILAK RAJ AND OTHERS reported in AIR 2003 SC 2658 is not applicable to the present case. The judgements of the Hon'ble Supreme Court in the case of ASHWANI KUMAR SINGH VS. U.P. PUBLIC SERVICE COMMISSION AND OTHERS reported in AIR 2003 SC 2661 and GOVERNMENT OF W.B. VS. TARUN K. ROY AND OTHERS reported in (2004) 1 SCC 347 will not help the case of the respondents.

29.6 In my view both the petitioners and other persons appointed by the respondents are similarly situated and the respondents have failed to show that there is a difference in classification based on dutyship. In my view the duties and functions both of the petitioners and other persons employed by the respondents are similar. The petitioners are therefore entitled to the pay scale which the other persons employed by the respondents are getting. The judgements of the Hon'ble Supreme Court cited by the respondents are not applicable to the present case.

29.7 The learned counsel for the respondents has raised contention regarding characteristics of the engagement of petitioners as Border Wing Home Guards.

The said facts have been taken into consideration by the scheme of the Central Government and the Hon'ble Supreme Court has considered the said scheme and thereafter given the finding that the petitioners are entitled to relief as prayed for in the said petition. Therefore, the contention of the learned counsel for the respondents that the petitioners are not the members of Para military Force and they are just like Rural Home Guards and Urban Home Guards and they are not posted at the actual international border, their placement is as per exigency of requirement, they are entitled to ad hoc honoraria, has no relevance. In fact the argument regarding disembodiment of Home Guards which is always company-wise as well as individual wise may not be relevant because the Hon'ble Supreme Court has considered these facts and answered against the Union of India.

29.8 As regards the petitioners do not deserve regularisation, it may be noted that the Government has issued advertisement, the petitioners have applied for the same, examinations were taken, interviews were taken and thereafter the petitioners have been selected and thereafter training has been given to them. In view of the same, the petitioners are regularly recruited as per the provisions of the Act and there is no backdoor entry or ad hoc appointment or temporary appointment. They fulfill the qualification and therefore the question of regularisation will not apply in this case because the judgements which have been cited by the learned counsel for the respondents, namely, Delhi Development Horticulture Employees Union (supra), State of UP Vs. U.P. Madhyamik Shiksha Parishad (supra), State of U.P. Vs. Ajay Kumar (supra), K.D. Vohra Vs. Kamleshbhai (supra), all these cases deal with the employees who are appointed on temporary basis but this situation is not in the present case and therefore these judgements will not apply in the present case.

29.9 The learned counsel for the respondents has contended that there cannot be any parity between part-time and full time (regular) Border Wing Home Guards. It may be noted that I have already discussed this point that merely because the State Government or the Central Government observes that the petitioners are part-time employees that will not treat these employees as part time. The real factual aspect of the matter I have stated and considered that the petitioners have worked round the year and more than 12 to 15 hours a day entirely in border area. There was hardly any break and whichever break is there, which is very normal to fulfil the family duties and merely because calling the

petitioners as part-time, it is a wrong nomenclature given by the respondents. The reality is quite different and therefore there is no question of considering parity between the part-time and full time BWHGS and whatever the full time BWHGS get, the petitioners must also get the same in this behalf. In view of the same, the petitioners have proved and substantiated a clear-cut-basis of equivalence and resultant hostile discrimination that the question of considering the petitioners as part time is a hostile discrimination and therefore they are entitled to relief in this behalf. Therefore, the contention that there is no question of comparison between the petitioners and full time (regular) BWHGs is not accepted because the petitioners have worked as full time employees. The contention of the learned counsel for the respondents that there is no question of equal pay for equal work will have no relevance.

29.10 As regards policy/practice of disembodiment, I have discussed the same and even the Hon'ble Supreme Court has also considered the same and in spite of the same, the Hon'ble Supreme Court has given relief to the petitioners and therefore the ground of disembodiment will not help the respondents.

29.11 The respondents have tried to distinguish the judgement of the Hon'ble Supreme Court which I have already considered and therefore that argument is not applicable. In view of the same all the contentions raised by the respondents are not correct and all the contentions raised by the petitioners are correct and therefore the petitioners are entitled to relief. In view of the same, the petitioners are entitled to the following reliefs.

30. In this behalf I issue the following directions:

30.1 There existed master and servant relationship of the petitioners with the State Government. The petitioners are entitled to the same benefit as admissible to the permanent Border Wing Home Guards. Both the State Government and the Central Government are responsible for salary and other emoluments/allowances payable to the petitioners which the Central and State Governments had undertaken as per the provisions of the scheme issued on 27.6.1979 by Union Government (p. 430).

30.2 I further direct that the petitioners will be given all benefits admissible to the State Government's servants including fixation of pay, benefit of Provident

Fund, Gratuity, retiring benefits, leave privileges, all admissible Government allowances and increments as given to the State Government employees under the Rules.

30.3 The petitioners will be given the arrears of service benefits and fixation of pay scale from 30.7.2003 the date on which the petition has been filed.

30.4 The respondents are further directed to absorb the Part Time personnels of BWHGs retrospectively i.e. from 30.7.2003 and the age bar, if any, stands hereby waived.

30.5 As the judgement is delivered on the basic principles of justice and equality as enshrined in the Constitution of India, the Secretaries of Home Department and Finance Department, both of the State of Gujarat as well as Union of India are directed to implement this order/judgement within four months from date of receipt of the writ.

30.6 It may be noted that the above directions will be applicable only to the petitioners in this petition and it will not be applicable to any other persons.

31. The petition is allowed to the above extent. No order as to costs. Direct service is permitted.

32. Before parting, I would like to quote the following:

"GANDHI'S TALISMAN"

I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test:

Recall the face of the poorest and weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny? In other words, will it lead to Swaraj for the hungry and spiritually starving millions?

Then you will find your doubts and yourself melting away.

- As displayed in Gandhi Smriti - Birla House, New Delhi -

(from Working A Democratic Constitution - A

History of the Indian Experience by Granville Austin 2003 Edition)

This Court is extremely grateful to the learned senior advocate Mr. Girish Patel with Mr. Shalin Mehta, learned advocate for the petitioners and Mr. Kamal B. Trivedi, learned Additional Advocate General with Ms. Sangeeta Vishen, learned AGP and Mr.Malkan,learned Senior Standing Counsel who have very ably assisted this Court to go through the voluminous record of the case and decide the complicated and interesting question of law in this matter.

(K.M. MEHTA, J)
(saiyed/pkn)